United States Court of Appeals
for the Second Circuit

APPENDIX

76-7476

United States Court of Appeals
For The Second Circuit

No. 76-7476

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,
Plaintiff-Appellant-Cross-Appellee,

against

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,
Defendants-Appellees-Cross-Appellants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN, and ROBERT L. STERN as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims-Appellants-Cross-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
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JOINT APPENDIX—TRIAL TRANSCRIPT
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"During that period, there were many meetings on may days. I may well have attended a meeting with you. Your name doesn't happen to appear on this list. I have no specific recollection of this meeting."

And I have nothing further on that at this point.

Your Honor, is this a good time for a brief break?

THE COURT: Could you go another 15 minutes? Do you have a witness?

MR. MANDEL: I have a witness to put on and I would like to have a little water before.

THE COURT: All right. We will take our mid-morning recess, ladies and gentlemen.

(Recess)

STUART RAFKIND, called as a witness by defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MANDEL:

Q Mr. Rafkind, how long have you known Charles Gross?

A Seventeen years.

Q And how did you first meet him?

A On the floor of the New York Stock Exchange.

Q And what were you doing there at that time?

A I was a partner of a brokerage firm and a trader.

Q And for how many years have byou been a trader in stocks and securities?

A Seventeen years.

Q And did there come a time when you were associated with a firm named Rafkind & Company?

A Yes, 1962.

Q Until when?

A 1972.

Q All right.

Over the years did you form any kind of friendship with Mr. Gross?

A Yes.

MR. GRUTMAN: We already have that, your Honor.

THE COURT: Overruled.

Q Did you form an opinion of his capacity as a trader of securities?

MR. GRUTMAN: Objection.

THE COURT: On what ground?

MR. GRUTMAN: It is irrelevant.

THE COURT: I don't happen to have my pleadings here. But isn't that an issue here as to a relationship that arose between these parties?

MR. GRUTMAN: No. There is only a question of whether an employment opportunity which Mr. Gross contends was offered to him and whether he was the world's greatest or most indifferent trader I think is irrelevant. Simply the fact of the offer of employment is all that would be relevant.

THE COURT: No. I think it would be implicit in the offer that he felt this was a competent man.

Overruled. You may answer.

A Yes.

Q And what was your opinion of Mr. Gross' ability as a trader?

A He was a great trader. He was the second best trader in Wall Street. I'm the best.

Q Did there come a time when Rafkind & Company cleared through Newburger Loeb?

A Yes. I believe we started 1962 when we originated the firm.

Q And during that period of time did you occupy premises in the same space as Charles Gross was occupying premises?

A Yes. We were right next to Gross & Company, in the same room.

Q And during that time you got to know Mr. Gross even better than you knew him before?

A That is correct.

Q I direct your attention to January of 1971 and ask whether you had occasion to speak with Mr. Gross at that time?

A I met Mr. Gross at the Stock Exchange Luncheon Club in early January 1971 and he told me he was unemployed.

MR. SHAW: Objection on behalf of everybody that I represent. This conversation is not binding on us in any way.

THE COURT: I'll take it subject to connection.

Q Did the conversation proceed further?

A Yes. I offered him employment at Rafkind & Co.

Q Would you state the details of the proposal?

A I offered Mr. Gross a half million dollar trading account which he would share in 50% of all profits after expenses.

Q And can you explain that a little more fully so that his Honor and the jury can understand?

A Well, there are minimal charges of each trade and interest on the debit balance of the account. After those expenses we would share each-- the profits of each trade 50%.

Q You said you would make half a million dollars available.

MR. SHAW: No, he said he offered a half million dollar trading account, your Honor. I object.

THE COURT: No. No. Go ahead. Put your question.

Q You said you would make half a million dollars available.

Would you explain how that would be done and --

A We would take a half million dollars, put it in an account called the Gross Trading Account, which would be an account of Rafkind & Co., and all the trades that Mr. Gross would make would be entered into that account. And he would get a draw of whatever he needed and the profits were half his, less the expenses, and we would keep all our money in as he made money. If he made $100,000, $550,000 would remain; if he wanted to pull out $50,000, and we felt that -- I felt that--

MR. SHAW: Objection to everything after the word "I felt," unless it was communicated to Mr. Gross, and then I object because my clients were not present.

THE COURT: Let's go on to the next question.

MR. MANDEL: All right.

Q And did you make this specific proposal to Mr. Gross?

A I did.

Q And did he accept it?

MR. SHAW: Objection to leading, your Honor.

THE COURT: No. We had the proposal.

What did Mr. Gross say to that proposal, Mr. Rafkind?

THE WITNESS: He accepted.

Q And what happened after that, Mr. Rafkind?

I call your attention to --

MR. SHAW: Objection, your Honor. The witness has been asked what happened after that.

THE COURT: Mr. Shaw, please let's get the question out before you have an objection. I don't even know what the question is.

MR. GRUTMAN: What happened next?

MR. SHAW: What happened after that?

THE COURT: And he called his attention to something.

Q I call your attention to a document marked AAAA for identification. Do you recognize the signature on that document?

A That's right. It is a partner of our firm, Carl A. Rafkind.

THE COURT: Do you offer that letter in evidence?

MR. MANDEL: Yes, I do. I am going to show it to counsel.

THE COURT: All right.

Mr. Mandel, have you shown the exhibit to the other side already?

MR.MANDEL: Yes. I showed them to whoever was here, and they have all been marked on depositions.

THE COURT: All right.

(Pause)

MR. GLATZER: I object to the letter on behalf of Kayne. It was addressed to Newburger Loeb on January 1971. None of them were partners of the firm.

MR. SHAW: I object on behalf of Mr. Aixala, your Honor.

MR. GRUTMAN: I object on behalf of Finley Kumble.

MR. SHAW: And I would like a continuing objection on behalf of Mr. Aixala on this line of proof.

THE COURT: I am admitting it in evidence subject to connection against all defendants.

MR. GLATZER: Can we have a continuing objection to the line of proof?

THE COURT: You had better make your specific objections known as you go along because I don't know where it stops. This is an entirely new cause of action and I don't know where this line of proof leaves off.

You may read it to the jury.

xxx (Defendants' Exhibit AAAA for identification was received)

(Mr. Mandel read to the jury from Defendants' Exhibit AAAA in evidence)

BY MR.MANDEL:

Q Mr. Rafkind, are you familiar with the customs and regulations of the New York Stock Exchange?

A I am.

Q Will you explain what this request for clearance embodied in AAAA is?

A Well, when you hire someone, you have to get clearance from the previous firm. And that's just what we did.

Q Just what you requested in this AAAA letter?

A Yes.

MR. MANDEL: Counsel shows Mr. Shaw, Mr. Grutman and other opposing counsel a document marked BBBB for identification and asks if they will admit authenticity.

THE COURT: You offer it in evidence?

MR. MANDEL: Yes.

(Pause)

MR. MANDEL: I should state for the record that this is a copy received on deposition from the--

MR. SHAW: This appears to be authentic, and I say this on behalf of the corporation.

However, I can make no statement that would be binding on Mr. Berkowitz, whose name appears in this letter.

I would also object in behalf of Aixala.

MR. GLATZER: I press the objection on behalf of our client. I had not seen that before and it is not signed. I don't doubt that it is authentic.

MR. GRUTMAN: I likewise object on behalf of Finley Kumble.

MR. ESTERMAN: Objection as not binding on Persky.

MR.MANDEL: I'm not sure whether we have an objection on the ground of authenticity.

THE COURT: We do not.

MR. GRUTMAN: No objection as to authenticity by Finley Kumble.

THE COURT: No objection as to authenticity.

(Pause)

THE COURT: It may be received.

xxx (Defendant's Exhibit BBBB received in evidence)

MR. MANDEL: May I read it to the jury, your Honor?

THE COURT: You may.

(Mr. Mandel read to the jury from Defendant's Exhibit BBBB in evidence)

Q I show you now a copy, Mr. Rafkind, of CCCC for identification and ask you if you know what that is.

A Yes, I do.

Q What is that?

A After all the static from Newburger Loeb --

MR. SHAW: Objection. Move to strike.

THE COURT: Yes.

Q What is the letter?

A The letter is we cancelled our employment with Mr. Gross.

MR. SHAW: Objection. Move to strike.

THE COURT: Strike that out.

But look at this and see if there is any objection to this letter going in on the same basis as the others.

(Pause)

THE COURT: In other words, preserving the objection you had to the earlier two, is there any difference or other objection you have to this one?

MR. SHAW: I also believe that this is authentic, your Honor. However, I am not able to make any concession in behalf of Mr. Berkowitz, who I don't represent.

THE COURT: Well, Mr. Berkowitz represents himself, so you do not speak for him.

MR. SHAW: Correct. And I also object upon the ground of Aixala, who I believe has not been shown to have any connection with this matter.

THE COURT: Yes. Admitted subject to connection, as I have with the prior two exhibits.

MR. GRUTMAN: Same objection, your Honor.

MR. ESTERMAN: Same objection.

MR. GLATZER: Same objection.

THE COURT: Very well. It will be received.

(Defendant's Exhibit CCCC for identification received in evidence)

MR. MANDEL: May I read this to the jury, your Honor?

THE COURT: You may.

(Mr. Mandel read to the jury from CCCC in evidence)

BY MR. MANDEL:

Q Mr. Rafkind, before Exhibit CCCC was mailed, did you have any discussions with anybody in Rafkind & Co. in connection with the prior correspondence?

A Yes.

Q Will you state who you spoke to and what the substance of the discussion was?

MR. SHAW: Objection to the substance of the conversation.

THE COURT: Is this Rafkind & Co.?

MR. MANDEL: With Rafkind & Co. as his company. And what I'm attempting to do, your Honor, is --

THE COURT: I'll sustain an objection to that question. This is conversations not with anybody connected with this action within his own company, is that right?

MR. MANDEL: Yes, having to do with the decision.

All right, let me put it another way.

Q Was Mr. Berkowitz' letter --

MR. SHAW: Objection.

THE COURT: Let's hear what the question is, Mr. Shaw.

Q -- marked and received in evidence as BBBB called to your attention?

A Yes, sir.

Q At about that time?

A Yes, sir.

Q On the basis of that letter, did you make any decision?

MR. SHAW: Objection, your Honor. This calls for the state of his mind or an operation of his mind.

THE COURT: I take it following Mr. Berkowitz' letter and following a conference that you had with your colleagues, Mr. Rafkind you sent the letter CCCC, is that correct?

Q Is that correct?

A That is correct.

THE COURT: OK. Very good.

Q Did you have any communication with Charles Gross concerning these documents?

A Yes.

Q What did you say to Charles Gross?

A I told him we have a lot of problems, that Newburger Loeb is threatening us with a lawsuit and going to the New York Stock Exchange, but I was going to go ahead with it. Some partners disagreed. I wanted to go ahead with--

MR. SHAW: Objection. He is not now talking about a conversation, your Honor.

THE COURT: You wanted to go ahead with it, is that right?

THE WITNESS: Yes.

THE COURT: All right.

A (continuing) --but our attorneys--

MR. SHAW: Objection to what the attorneys said.

THE COURT: Yes. I'll sustain that.

Q But what did you say to Mr. Gross about the proposed employment?

A I told him we would have to cancel it because of the Newburger Loeb question--

MR. SHAW: I would like an instruction that anything with respect to the word "threatening" or "going to" is only proof of a conversation between Mr. Rafkind and Mr. Gross.

THE COURT: Yes. At this point that's all that it is, ladies and gentlemen. It is proof that there was a conversation and this was the subject of the conversation.

BY MR. MANDEL:

Q I show you a document marked as DDDD for identification and ask you if you ever saw that before.

A Yes, I have.

MR. MANDEL: I offer it in evidence.

MR. GRUTMAN: No objection by Finley Kumble as to that document.

THE COURT: All right.

MR. ESTERMAN: No objection.

THE COURT: It may be received.

xx (Defendant's Exhibit DDDD received in evidence)

MR. GLATZER: I make the same objection on behalf of our client.

THE COURT: All right.

MR. MANDEL: May I read it to the jury?

THE COURT: You may.

(Mr. Mandel read to the jury from Defendant's Exhibit DDDD in evidence)

BY MR. MANDEL:

Q Mr. Rafkind, based on your experience as a trader, do you have an opinion as to what Mr. Gross would have earned under the proposed employment with Rafkind?

MR. SHAW: Objection.

MR. GRUTMAN: Objection.

MR. GLATZER: Objection.

THE COURT: Yes. Sustained at this point.

MR. MANDEL: May I have the reason, your Honor?

THE COURT: There is no foundation.

MR. SHAW: Objection, your Honor.

THE COURT: Of course, he may have --

MR. SHAW: May we do it at the side bar?

THE COURT: No. I'm going to do it from here. There is no foundation laid for that, Mr. Mandel.

MR. GRUTMAN: I submit, your Honor, none could be established.

THE COURT: I don't know that one could be established. But I can make the basis for any ruling known in open court.

MR. GRUTMAN: Of course, your Honor. But the reason we asked for it at the side bar is that I believe in good faith that any question on this would be improper.

THE COURT: I don't know whether a foundation can be laid or not but there certainly has not been one laid at this stage of the record.

MR. MANDEL: All right.

Your witness.

CROSS-EXAMINATION

BY MR. SHAW:

Q I believe you indicated, Mr. Rafkind, that you are or were a partner in Rafkind & Co.

A I was.

Q You were?

A Yes.

Q And is that a partnership?

A A corporation.

Q A corporation. And is that corporation still in business?

A No. It is in liquidation.

Q Liquidation?

A Yes.

Q And when did it cease doing business?

A September 1972.

Q And were you employed by the corporation in September of 1972?

A Yes.

Q And how many persons were employed by the corporation in September of 1972?

A What part of September?

A The early part of September.

A The full staff.

Q And how many were the full staff?

A I'd say about 50 or 60.

Q 50 or 60 persons? And even though it was a corporation, were the persons in the corporation who would in the nature of partners hold a capital account or equity stoc

A We had subordinated lenders and officers and so forth.

Q And the officers owned stock, correct?

A Common, preferred, and so forth.

Q How many officers owned stock?

A Each officer, and I believe there may have been - offhand there may have been ten.

Q And were these officers persons who had trading

THE COURT: Yes. I am going to sustain that objection.

I son't see that bears on this witness' cross-examination.

MR. SHAW: Your Honor, I am making him my own witness on this point.

THE COURT: No. I decline to permit that at this stage of the trial.

Q In this letter that you wrote to Newburger Loeb after you spoke with Mr. Gross, you indicated to them that you wanted clearance, correct?

A That is correct. I didn't write the letter.

Q Your company wrote it, correct?

A That's right.

Q And what did you mean by "clearance"?

A That everything was in order at Newburger Loeb so we could hire him, that there were no problems with Mr. Gross at Newburger Loeb.

Q And whenever you hire or hired a person during the period that Rafkind & Company was in business, if that person had previously worked for a brokerage firm, wasn't it the invariable procedure to write such a letter asking for clearance?

A Yes.

Q You always, in other words, contacted the former employer?

A Correct.

Q To ask for clearance, correct?

A Correct.

Q And was it also the invariable procedure to contact the New York Stock Exchagne for clearance as well?

A I believe so, yes.

Q Right.

Now --

A I think the New York Stock Exchange contacts you and gives you clearance.

Q Right. And one of the things you are attempting to learn, I assume, are facts relating to the character and background and experience of the prospective employee, correct?

A Correct. And it is also just a formal way of doing things.

Q But it is not --

A I knew the background of Mr. Gross.

Q Did you know of Mr. Gross' various fines and censures by the New York Stock Exchange?

A I knew of one, yes.

Q Of just one?

MR. MANDEL: I object to this.

THE COURT: Yes. I am going to sustain that objection on the ground that there is no foundation laid for that question at this point.

Q Were you advised by the New York Stock Exchange regarding any fines and censures?

MR. MANDEL: Objection to that. It is irrelevant and I think it is an attempt to create a smear here.

MR. SHAW: Maybe the issue here, your Honor, is whether or not there are various possible reasons for Mr. Gross' nonemployment.

THE COURT: No. I will overrule that objection.

Q Which one did you hear about?

A I don't recall. But there was something, I believe, in the newspaper, that I had read about. I don't recall what it was.

Q Was that a fine and censure that was referred to in the newspapers during the early part of 1971?

A I don't recall. It is the one, I believe, when he was a partner of Newburger & Loeb. I don't recall anything else.

Q Was that the fine of $25,000?

A I think so. I'm not sure.

Q All right.

A These things happen frequently.

MR. GRUTMAN: I move to strike anything beyond that.

MR. SHAW: There is no question outstanding,I believe.

Q And did that come to your attention during the period that you were considering employing Mr. Gross?

A I believe so. I'm not sure.

Q And did that fine of $25,000 relate to some conduct that you also learned about?

A I really don't recall.

Q Did the fine relate to conduct on Mr. Gross' part involving, if you recall, borrowing of money against customers' stocks?

MR. MANDEL: I object to this. I think the only relevant question here would be --

THE COURT: What he knew. Yes.

I am going to sustain the objection.

I think you had better ask this witness what, if anything, he knew about it, and that will conclude our inquiry.

Q What did you know about it, sir?

A I really don't know. You know, I don't remember.

THE COURT: All right.

MR. SHAW: No further questions.

THE COURT: Very well.

CROSS-EXAMINATION

BY MR. GRUTMAN:

Q The fine that you referred to of Mr. Gross in the amount of $25,000, did you know whether or not that was the largest fine ever levied--

THE COURT: I am going to sustain an objection to this. That is within the ambit of my last ruling as to Mr. Shaw which is that you are to ask him what he knows about it.

Q What did you know about the size of the fine levied against Mr. Gross?

A I really didn't know. I knew there was a fine. How much it was, I don't know. What it was for, I really don't remember. But there have been many fines of this kind in Wall Street in those days.

Q If you were considering employing Mr. Gross, Mr. Rafkind --

A Yes?

Q -- did you not consider that it might be relevant to ascertain what the fine was for --

A No, not at all.

Q -- or how much of a fine had been imposed?

A Not at all. He was coming to us as a trader and nothing more.

Q Besides --

MR. MANDEL: He is interrupting.

THE COURT: Let him finish.

MR. MANDEL: Let him finish his answer.

THE COURT: Have you finished your answer?

A He was coming to Rafkind & Company as a trader and he was not doing anything else but trading.

Q In hiring Mr. Gross in whatever capacity you proposed to hire him for, besides his faculties as a capable trader, were not his integrity and moral probity of some concern to you? Just yes or no?

A Yes.

Q Did you not consider that looking into the circumstances of the fine which the Stock Exchange had imposed upon him shortly before you considered hiring him was something that you should have done in investigating that question?

A Not at all, sir.

Q Very well.

I believe you said that you had gotten clearance from Heine & Company?

A From whom?

I knew he was at their office. I didn't know if he was employed by Heine.

Q When you had the luncheon conference with him at the Stock Exchange Lunch Club and Gross told you the circumstances of his employment, did he not tell you that between the Newburger Loeb association and the time of the luncheon that he had been employed by Heine & Company?

A I don't remember, sir. I don't think so. I don't think he mentioned that, that he was with Heine. I think my upstairs partner may have found that out when he filed for his application.

Q When your firm wrote the Newburger Loeb Company, you were aware that Mr. Gross had been employed by Heine & Company because the letter which Mr. Mandel put into eivdence after he showed it to you reflected that you had already gotten clearance from Heine & Company, is that not true?

A That's true, but --

Q Mr. Rafkind, isn't it also true that you knew that if you employed Mr. Gross at Rafkind & Company and that even if Mr. Gross' employment with your firm was in violation of some provision of an agreement that he had with Newburger Loeb & Company, that is nothing which would affect you, only Mr. Gross?

A That's not what I was led to believe.

Q All right.

A If I had known that --

Q I have your answer.

If you had really wanted to get clearance for Mr. Gross to work for Rafkind & Company, did you know of the existence of procesure through which you might have done to the New York Stock Exchange to obtain clearance for him if you wanted to employ him and Newburger Loeb would not permit it?

MR.MANDEL: I object to the form of that question.

THE COURT: Read it back, please.

(Question read)

THE COURT: Sustained as to form.

Q Were you aware at the time that you say you offered employment to Mr. Gross, of the existence of procedures in the New York Stock Exchange which were available to you to arrange for Mr. Gross' employment even if Newburger Loeb refused to give clearance?

A I was not aware. If I was aware, I would have gone all the way to get him employed with Rafkind & Company I was told to drop the matter by our attorneys.

MR. GRUTMAN: I move to strike what he was told by his attorneys.

THE COURT: No. I think I'll permit it to stand.

This is a question of knowledge to him of procedures and he had the lawyer look into it, I take it.

Q Did Newburger Loeb & Company threaten that they would sue you if you hired him? Yes or no, please.

A Threaten who?

Q You.

A Personally?

Q Or your firm.

A Yes.

Q Where is the writing that says that?

A I was told that by my partner.

MR. GRUTMAN: I move to strike what he was told by his partner.

MR.MANDEL: Your Honor, he asked and he got an answer. Now he moves to strike it.

MR. GRUTMAN: I asked for competent evidence, Judge, and that is not competent.

THE COURT: Let me hear the question.

(Question read)

THE COURT: No. I'll let it stand.

Q Is it the fact that there is no correspondence between your firm and Newburger Loeb in which Newburger Loeb threatened to sue your firm?

MR. MANDEL: I object to that because it calls for a characterization of the documents in evidence and I believe the documents in evidence themselves constitute the threat to sue.

MR. SHAW: Objection, your Honor.

MR. GLATZER: Objection.

THE COURT: Yes. I'll sustain it as to form. You may further inquire.

Q The last letter you got from Mr. Berkowitz, which is Exhibit DDDD, stated as follows:

"You should be aware that my letter of January 26th did not state any 'objections' but was merely a factual recitation of the contents of a document signed by Mr. Gross."

A Yes, but --

Q Just a moment.

Did you interpret that language --

MR.MANDEL: Excuse me.

May I see that? Are you reading from this?

I want to put this copy in evidence, your Honor. I want to put this particular document in evidence.

MR. GRUTMAN: This is not proper.

had a cc, meaning copy to Robert Persky on it. That is the only thing, the only difference.

Q Mr. Rafkind, did you see the letter of February 1, 1971, which is Finly Kumble Y?

A I saw a lot of exhibits.

Q The one that Mr. Mandel showed you that was DDDD, did you see that letter at the time that it was addressed to your firm by Newburger Loeb?

A Yes.

Q Did you interpret the paragraph which I just read to you as a threat?

A This was --

Q Could you answer my question?

A But this came after we were told. There was a letter preceding this letter.

Q Did you interpret that letter as a threat? That is my present question.

A The other letter, yes.

Q No. Did you interpret this letter as a threat?

A No.

THE COURT: The answer is no.

Q And that letter which I have just shown to you is the last letter that you received in such correspondence as you had with Newburger Loeb concerning the prospective employment of Mr. Gross?

A I believe so, yes.

Q The last paragraph of the last letter reads:

"Any questions concerning the enforceability of that agreement and whether or not your firm wishes to enter into an employment arrangements with Mr. Gross are questions solely for your decision."

Correct?

A On this letter, yes.

Q Is it a fact, Mr. Rafkind, that no proceedings were brought against Rafkind & Company by Newburger Loeb?

A We did not hire Mr. Gross.

Q And no suit of any kind was ever commenced against you by Newburger Loeb?

A On this case?

Q On this case.

A Yes.

Q Were there any other proceedings brought by the Stock Exchange concerning this employment or prospective employment?

A No.

Q Has there been any litigation between Rafkind & Company and Newburger Loeb?

A We used to clear through Newburger Loeb.

Q My question was, was there any litigation, sir?

A At one time, over office furniture.

Q You say that Mr. Gross has been known to you for 17 years and that you regarded him as the second best trader in Wall Street, modestly regarding yourself as the first best?

A Yes.

Q If Mr Gross had come to Rafkind & Company, your firm would have had the No.1 and No. 2 traders on Wall Street, right?

A True. Absolutely.

Q And would it not be reasonable to say that if in fact the No. 1 and No. 2 traders were at one firm, the presence of the second best joining the best would be an asset to your firm?

A Absolutely.

Q And would attract business to your firm?

A No, sir.

Q When somebody is at a firm, some registered representatives have a reputation for sagacity in trading --

A We were not--

Q Wait. I didn't finish. Just wait until I finish my question.

A All right.

Q Don't traders in Wall Street have what is known as a following?

A No, sir.

Q Not at all?

A I don't have one.

Q Is it your testimony that the presence of Mr. Gross at your company would in no way have influenced anybody to come and do business with your company?

A In my opinion, no.

Q Isn't it a fact that in Wall Street, registered representatives, when they come to a concern, bring with them what is calledas their customer list or their following?

A Mr. Gross was not coming to Rafkind as a registered representative.

Q I didn't ask you that.

THE COURT: Well, then there is no foundation for your question.

Q I show you Exhibit AAAA. That is the letter written by your firm which begins as follows:

"Mr. Charles H. Gross has applied to us for employment as a registered representative."

Now, Mr. Rafkind, is it not the custom in Wall Stree that when a registered representative moves from one concern to another, his following or his customer list goes along with him?

A That's true, sir. But --

Q That's all that I asked.

MR. MANDEL: Let him answer his question.

MR. GRUTMAN: I have an answer.

THE WITNESS: There is more to the answer.

THE COURT: That will come out in due time, Mr. Rafkind, I'm sure.

MR. GRUTMAN: Right.

Q Now, Mr. Rafkind, the provision of the partnership agreement which was cited by Newburger Loeb's counsel, Mr. Berkowitz, was known as a non-compete clause, right?

A Yes.

Q That is not an uncommon provision on Wall Street?

A We didn't have one in our firm.

Q I didn't ask you about whether you --

MR.MANDEL: I object to that as irrelevant.

THE COURT: No. Overruled.

Go ahead.

Q You know of the existence of other non-compete clauses in other stock brokerage concerns, don't you?

A No, I don't.

Q You never heard of a non-competitive clause --

A This is --

Q Just a moment.

Is it your testimony, Mr. Rafkind, that you never heard of any stock brokerage house --

THE COURT: That was not his testimony.

Q You know of no other non-compete clause --

A Absolutely. I never heard of it.

Q -- in any stock brokerage house's business?

A In a stock brokerage house business I never heard of it before. That's what I'm asking you. Rafkind & Company did not have one and that is the first I ever heard of it.

Q By the way, Charlie Gross was known as a big producer, wasn't he?

A Not to me, he wasn't. Not to me, and I sat next to him for many years.

Q At the time that you were with Charlie Gross, did that include any period of time while he was at Newburger Loeb?

A Yes, it did.

Q And you were unaware of the fact that Charlie Gross was a big producer?

A I knew Charlie Gross had lots of big producers but I did not know that Charlie Gross himself -- what do you call a big producer?

Q I mean a man who produces large revenues --

A What is large revenues?

Q Substantial five figures or six figures.

MR. MANDEL: Your Honor --

A Five figures?

MR. MANDEL: I am objecting as to form because we are playing with words. The question is commission revenues or trading profits. And Mr. Grutman is being ambiguous in his question.

Is a large producer a person who produces trading profits or a person who produces a lot of customer business?

THE COURT: Let's get an answer to this and go on to something else.

I can't see this as highly relevant cross-examination.

Mr. Grutman, what are you after here?

MR. GRUTMAN: I am after establishing the legitimacy which Newburger Loeb had of enforcing the provision of the restrictive covenant or non-compete clause which it had in a person who, if he went from one concern to another, might be an attraction.

THE COURT: How are you going to establish the legitimacy with this gentleman?

MR. GRUTMAN: Perhaps this gentleman's knowledge in 17 years in Wall Street might enable us to get from him--

THE COURT: He has negated that. He said he had not heard of such before.

Am I right?

THE WITNESS: The New York Stock Exchange --

THE COURT: There is no question, Mr. Rafkind, before you.

BY MR. GRUTMAN:

Q Instead of pursuing the right to hire Mr. Gross from Newburger Loeb, why didn't you try to hire him from Heine & Company?

MR. MANDEL: I object to that.

MR. GRUTMAN: That was his immediate preceding employer.

THE COURT: There is no foundation for that. Hiring from? What is he hiring him from?

MR. GRUTMAN: Your Honor, he used the phrase in connection --

THE COURT: This is the letter to get a clearance.

Q Why didn't you try to get a clearance directly from Heine & Company and let it go at that?

A I believe when I met Mr. Gross I thought that he was unemployed at the time, and I think that my partner upstairs notified Newburger Loeb because everyone in Wall Street knew Charles Gross was with Newburger Loeb and not Heine & Company.

Q In the time that you have known Mr. Gross, have you ever made any money with Mr. Gross?

A Did I ever make any money with him?

Q You or your firm?

A No, no. Absolutely not.

Q Did you ever trade in Westec stock?

A Did I ever trade in Westec stock?

Q You or your concern?

A Yes.

Q Did you ever make--

MR.MANDEL: Is this relevant, your Honor?

THE COURT: I don't see how this is relevant.

MR. GRUTMAN: Conceivably, Judge, if I can probe this witness' testimony, I might be able to establish some reason for bias in favor of a man whom he has known as a friend for 17 years. And if he made a profit in dealing with him, that might be relevant.

THE COURT: He says he did not.

MR. GRUTMAN: So he says. If that's the end of it, I'll go on to something else.

THE COURT: Please go on.

Q You said that you were with Rafkind & Company from 1962 to 1972.

A That is correct.

Q Who are you with presently?

A Presently?

A Yes.

A S. D. Cohn & Company.

Q Is that in the securities business?

A Yes.

Q In answering some of the questions that were put to you, there were some questions asked about certain fines or censures and you used the phrase "these things happen frequently."

Do you remember saying that?

A I said at that time they happened frequently.

Q Mr. Rafkind, in April of 1971, were you fined $25,000 for violation of just an equitable principle of trade by the American Stock Exchange?

A Right. And it was turned down by the New York Stock Exchange.

MR.MANDEL: Just a moment, please. I object. Is this relevant, your Honor?

THE COURT: Let me see those rules of evidence.

MR. GRUTMAN: I think I gave them back to

Mr. Esterman. He has the copy.

(Pause)

MR.MANDEL: Your Honor, may we approach the side bar?

MR. SHAW: We couldn't do that when I wanted to.

(Pause)

THE COURT: I'll permit an answer.

MR. GRUTMAN: Could I have my question read back?

THE COURT: You may.

(Question read)

(Answer read)

MR. GRUTMAN: I move that the latter portion be stricken.

THE COURT: No. I'll permit it to stand.

Q The American Stock Exchange and the New York Stock Exchange are separate organizations, are they not?

A Yes. But when you are fined normally by the New York Stock Exchange, the American Stock Exchange usually goes along.

Q The fine in your case was by the American Stock Exchange, correct?

A Yes.

Q And is it also correct, Mr. Rafkind, it was the largest fine ever levied?

A I don't know.

MR. GRUTMAN: No further questions.

MR. GLATZER: Your Honor, I have one or two.

CROSS-EXAMINATION

BY MR. GLATZER:

Q Mr. Rafkind, when you sent Exhibit AAAA to Newburger Loeb and Company requesting clearance, was it not your understanding or would it not be your understanding that implicit in the request for clearance was the right to say yes or no?

A That's true.

Q You said that you never heard of a non-compete clause before Newburger Loeb's? Who told you of the clause?

A In that letter.

Q Who told you that it existed? Is that the first time you ever heard of it?

A The first time I heard of it.

Q Did you ask Mr. Gross about it?

A No, I didn't.

Q You have never spoken to Mr. Gross about that clause until today?

A No.

MR. GLATZER: No further questions

THE COURT: Anything else?

REDIRECT EXAMINATION

BY MR. MANDEL:

Q Mr. Rafkind, what is your understanding of the meaning of "a big producer"?

A Someone who does big with the public.

Q Who produces big commissions?

A Commissions, yes.

Q Your intended employment of Mr. Gross was as what?

A A trader.

Q And does a trader do business with the public?

A No.

He was going to buy and sell, to make a profit with your money, is that correct?

A With our money, yes.

Q Now, under the rules of the Stock Exchange, if you employed a trader, must he be regarded as a registered representative?

A That's how the whole argument between me and my partners came about. I told them not to file because they didn't have to file this form to get clearance, because he was a trader, he was not going to do business with the public. he was just going to trade with our money. And they said they have to send it in, and that's how -- otherwise Mr. Gross would have been employed by Rafkind & Company

Q But the advice you receifed was that to employ him as a trader you had to treat him as though he were a registered representative?

A Right.

Q But you spoke in conversation -- rather, you spoke in response to Mr. Grutman's questions about conversations between your firm and Newburger Loeb & Company's representatives, is that correct?

A That is correct.

Q Did your firm make it completely clear in those conversations that Mr. Gross was to be employed as a trader only?

MR. SHAW: Objection, your Honor.

A I believe so, yes.

MR. SHAW: Objection, your Honor.

MR. MANDEL: They opened the door.

MR. SHAW: I believe this is a conversation on the part of some officer, not this man with Newburger Loeb.

THE COURT: No. I think unless we have some competent way of knowing what the communication was, there is no basis for it.

MR. MANDEL: Your Honor, I would like to make this clear. I think it is competent because Mr.Grutman opened the door by asking for reports.

Q Did you receive a report from anybody employed by Rafkind & Company as to a conversation with Newburger Loeb?

MR. GRUTMAN: I object to that, your Honor.

THE COURT: Where is this now? I'm puzzled.

MR. GRUTMAN: He wants reports, amorphous, vague reports.

THE COURT: I'm puzzled as to --

MR. MANDEL: Your Honor, what I would be asking for is hearsay, except that Mr. Grutman opened the door on his cross-examination. He asked Mr. Rafkind about communications between Rafkind and Newburger Loeb which were not personally held by Mr. Rafkind, and Mr. Rafkind gave him an answer, and I think I am entitled --

THE COURT: What area?

MR. GRUTMAN: I asked about threats. He volunteered the report, and I objected, but you let the answer stand. That can't be called an invitation to open the door to all of this hearsay that Mr. Mandel wants to stuff the record with.

MR.MANDEL: Mr. Grutman asked about threats. Mr. Rafkind responded that there were threats in a telephone conversation between somebody at Newburger Loeb and somebody at Rafkind.

I am going further into that telephone conversation.

MR. GRUTMAN: Never heard about the telephone conversation. There was no mention of it, I believe. Written reports.

MR. MANDEL: No, no, no.

THE COURT: Why don't you ascertain how he learned of these threats and let's see how close we can get.

MR.MANDEL: All right.

Q How did you learn of the threats of litigation?

A I had two partners upstairs, Mr. Carl Rafkind, Mr. Arnold Levy, who were handling the talks between Rafkind and Newburger Loeb.

Mr. Levy told me that--

MR. GRUTMAN: Objection. What Levy or Carl Rafkind said I ask be stricken. That is hearsay.

THE COURT: Wasn't the door opened as to threats?

MR. GRUTMAN: I object, your Honor. I asked were there any written documents about threats?

MR. MANDEL: No, no. First he asked --

MR. GRUTMAN: Please,your Honor.

THE COURT: Yes.

MR. GRUTMAN: I am responding to your question.

I recall distinctly. I asked if there was any evidence of any -- any written evidence of threats. The answer included this gratuitous mention of oral reports.

I objected and asked that it be struck. Your Honor said, "No, I consider that to be an answer."

I did not invite that ansewr, but you let it stand in the record.

THE COURT: Mr. Mandel ---

MR. MANDEL: What Mr.Grutman said was,were there any threats? And when Mr. Rafkind --

THE COURT: Said "Yes," he asked if they were in writing.

MR. MANDEL: And said something about it; then he tried to brush it away by confining it to writing.

THE COURT: I'll overrule the objection.

MR.MANDEL: All right.

BY MR. MANDEL:

Q How did you learn of the threats?

A I was told by Arnold Levy, who I think made the first phone call for clearance to Newburger Loeb, that we are looking for a lawsuit. And then I also heard from Mr. Carl Rafkind that we have problems with this thing.

MR. SHAW: Objection. Move to strike unless there is an identification of the person in Newburger Loeb making a statement and the recitation as to what that person said.

THE COURT: Was it reported to you who made the statement?

THE WITNESS: I believe it was Mr. Berkowitz.

MR. SHAW: Objection. Move to strike.

THE COURT: Overruled.

MR. MANDEL: May I call to your Honor's attention--

THE COURT: No. Overruled.

Next question.

I permit the answer to stand. Next question, please.

MR.MANDEL: All right.

BY MR. MANDEL:

Q Did Mr. Levy tell you what Mr. Berkowitz said?

A That "We are inviting a lawsuit."

MR.MANDEL: Nothing further.

RECROSS-EXAMINATION

BY MR. GRUTMAN:

Q Did Mr. Levy tell you whether it would be a lawsuit between Gross and Newburger Loeb?

A He told me "we are inviting a lawsuit."

Q Without specifying --

MR.MANDEL: Let him finish.

A I was sure it was from Newburger Loeb.

MR. GLATZER: I move to strike on behalf of my client because of no connection whatsoever.

THE COURT: It is not at this point connected. I'm taking it subject to connection.

BY MR. SHAW:

Q And did you understand that the lawsuit involved that clause in the partnership agreement with respect to restricting a person's employment activities for a period of time after he left the employ of his partnership?

A I did not know anything about the partnership contract. All I knew was that I was told if we hired Mr. Gross we were going to invite a lawsuit.

Q Didn't you understand from the correspondence that there was some sort of clause in the partnership agreement?

A When we received the correspondence, yes.

Q And was that clause something about a restrictive covenant? Do you know what that is?

A Yes, I know what that is.

Q And what does that mean to you?

A If you have an appetizing store and you sell it to someone, you can't open one across the street.

Q And in the conversation with -- who was it, Carl my record on the statement that I was going to make after you made that statement to the jury at the outset.

THE COURT: Very good.

MR. SHAW: I don't waive any rights.

CHARLES GROSS, a defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR.MANDEL:

Q Mr. Gross, how old are you?

A 53.

Q How long have you been in the securities business?

A 26 years.

Q And with what companies or partnerships or firms have you been associated within that period of time?

A I became a member of the Stock Exchange in April of 1949.

In August of 1949 I joined with my father in establishment of a firm called Gross & Company. I remained with that firm until December of 1951.

Between December of 1951 and June of 1956 I was a trader on the floor of the New York Stock Exchange for my own account, without any firm affiliation.

In June of 1956 I rejoined Gross & Company and I stayed with Gross & Company until it went out of business in December of 1968, December 31, 1968, at which time, subject to an invitation of the then partners of Newburger Loeb & Company, I became a partner of Newburger Loeb & Company. Remained with Newburger Loeb & Company until September 30, 1970.

Some time in December of January of 1970 or January of 1971 I became affiliated with Heine & Company. I remained with Heine & Company until September 1972.

In September of 1972 I became affiliated with a firm called Cohen, Simonson and Rea Company, which in October of 1973 merged into a firm now called Bruns, Nordeman, Rea & Company, and I remained with them until this date.

Q Mr. Gross, while you were with Gross & Company, were there various periods of time when Gross & Company cleared with Newburger Loeb & Company?

A There were.

Q What were those periods of time?

A There was a period from about December of 1950 through some time, probably in 1953, although I had left Gross & Company in December of 1951, that Gross & Company cleared through Newburger Loeb & Company.

It then cleared through Newburger Loeb & Company again from, I think, May 1959 through the close of business December 31, 1968.

Q Now, during the years 1962 through 1968, was your office and the office of Gross & Company physically located on the premises of Newburger Loeb & Company?

A Our offices were located in the main board room of Newburger Loeb & Company at 5 Hanover Square from the time they entered that building in February of 1962 through approximately June of 1968 or perhaps July, at which time they provided us with a slightly separate office on the 12th floor of the building, our office previously having been on the 8th floor in their building.

Q So that for the second half of 1968 that was the only time you weren't actually in the main office?

A That is correct.

Q Is that correct?

A At all times, Mr. Mandel, they paid our rent.

Q Did certain discussions occur between you and any representative of Newburger Loeb & Company toward the end of 1968?

A There were.

Q With whom did you hold those discussions?

A Initially with Mr. Robert Newburger. Then I had a conversation with, I think, both Mr. Newburger and Mr.Robert Stern, and subsequently I had conversations generally with both Mr. Newburger and Mr. Robert Stern and Mr. Leo Stern.

Q About when the first of these conversations occur?

A In October of 1968.

Q And you had that with whom?

A Mr.Robert Newburger.

Q And what was the substance of that discussion?

A Mr. Newburger came up to our premises on the 12th floor and he told me that they had had-- they, Newburger Loeb, had had to ask Rafkind & Company to cease clearing through them because their business was too great and they could no longer accommodate it and now they found that their business was still too great for them and they asked if Gross & Company would find other clearing arrangements because they could no longer accommodate our business.

Q Were you familiar with the state of the record-keeping and the so-called back office of Newburger Loeb & Company at that time?

A Not at that time. I personally was not familiar.

My office apparently was, as I have since found out. But--

MR. SHAW: Objection. Move to strike everything after "my office."

THE COURT: Yes. Strike it out.

Q What response did you give to Mr. Newburger?

A I told Mr. Newburger that, since I had had a heart attack the year before--

MR. GRUTMAN: Objection.

THE COURT: No. Overruled.

A Since I had had a heart attack the year before and had been considering closing down the business of Gross & Company at the end of that year in any case, because the business was becoming really too much, and we had two alternatives: either go on with it or cut it off, that that would work no hardship on me, and that he had made up my mind definitely and that I would close down Gross & Company, or at least leave it myself, at the end of that year.

Q Did he make any further response to that?

A About a week ago--

MR. SHAW: About a week later?

A About a week later - - I'm sorry -- he and Mr. Robert Stern came back to my office and Robert Newburger told me that he had reported to his partners my response tohim at the previous meeting and that they wanted to inquire and to tender tome an offer to become a partner of their firm when I dissolved Gross & Company, and he explained to me that if I joined their firm, of course I would have other partners along with me and much less of the brunt of management would fall on me than it had with Gross & Company.

Q Did you have any further discussions about that subject?

A Well, I of course reflected on it and discussed it with my wife and with some others and then I came back and I reported to them that if we could work out auitable arrangements, I would become a partner of Newburger Loeb & Company.

Q And what happened after that?

A Well, we did discuss various arrangements and I did join Newburger Loeb & Company on January 2, 1969 as one of the four equal partners with the largest interest in the firm, myself along with Robert Newburger, Andrew Newburger and Robert Stern.

Q Do you recall what your percentage of interest was to be in the firm?

A 16-1/2 percent.

Q And were you required ot make an investment at that time?

A I was.

Q In connection with that?

A I was.

Q And what was the size of the investment which you made at that time, that is, at the beginning of 1969?

A I believe my investment was something in excess of $900,000.

Q When you joined the partnership, you were not managing partner, is that correct?

A That is correct.

Q Did you become managing partner at a later date?

A I did.

Q Would you explain how that came about?

A In June of 1969 when it became apparent --

MR. SHAW: Objection to everything after "it became" --

THE COURT: No, I'll permit it at this point. Let's see what his answer is.

Go ahead.

A -- when it became apparent that Newburger Loeb was going to be released from the restrictions that had been imposed upon them by the New York Stock Exchange in April 1968 or thereabouts, Mr. Robert Newburger, Mr. Robert Stern and another partner,Mr. John F. Settel, and I holed up in the Hotel Barclay in New York City for the purpose of determining what directions and what course we then wanted Newburger Loeb to go in.

If I might explain, during the period that Newburger Loeb was on restriction it had not been permitted to expand its business in any way.

Q Well, let's get to these restrictions.

When were the restrictions put on Newburger Loeb?

A Probably very shortly after April 1968. They came about as a result of the fact that Peat Marwick Mitchell could not complete, in a timely fashion, or in fact never was able to complete, their audit of Newburger Loeb because of the condition of Newburger Loeb's back office at that time.

MR. GRUTMAN: I move to strike that portion of the answer.

MR. SHAW: I concur.

THE COURT: No.

Q When you talk about the back office and the back office problem, what do you mean?

MR. SHAW: Objection, your Honor.

THE COURT: What is the objection?

MR. SHAW: The objection is that this is an interpretation, and in addition, your Honor, this is the subject of all sorts of documents which I have marked.

Mr. Mandel has objected to it and the Court has sustained the objection. The entire history of this is set forth.

THE COURT: On the record as it then stood I sustained an objection to certain exhibits. There are questions now being put to this witness about gack office problems. He was in the company. He learned about them in the course of his employment. I don't see any reason why he can't answer what they are.

The objection is overruled.

You may answer, sir.

THE WITNESS: May I have the question?

THE WITNESS: Yes.

(Question read)

A Colloquially, Wall Street has been divided into the front office, which is where the registered representatives stood, or sat, I should say, and where business was generated, the area in which business was generated, and the business was- - the administration of that area. The business would be considered the front office.

The back office concerned itself with the processing of the business that had been done. It involved the receipt and delivery of money, securities, the marginings of securities, the safekeeping of securities and all of the other relevant functions, such as dividend payments, statements generating, et cetera.

Q Issuing confirmations?

A Issuing confirmations, monthly statements.

Q Bookkeeping of customers' transactions?

A All the bookkeeping functions to effectuate the transactions that had been made by the firm or its personnel.

Q And during this period of 1968 and 1969 and 1970, was there a general epidemic of back office problems in Wall Street?

MR. SHAW: Objection.

THE COURT: What is the purpose of this inquiry, Mr. Mandel?

MR. MANDEL: This is preliminary background material, your Honor, which will be connected.

THE COURT: I'll permit it. Overruled.

A I think that was a period that was referred to as the time when Wall Street was in chaos.

Q And what had occasioned, if you know, that condition?

MR. SHAW: Objection, your Honor. I think it is relevant as to what had occasioned it at Newburger Loeb, not in Wall Street, or in some other house.

THE COURT: Let's take it at Newburger Loeb first.

MR. MANDEL: All right.

Q What had occasioned that condition in Newburger Loeb?

A Newburger Loeb had been, well, I think at that time they were the largest securities firm that was still processing its business by hand rather than by computers and other sophisticated office machines and they were unable, in their back office, to keep pace with the volume of trading that had suddenly-- that had generated itself from about 1965 or 1966 on and which was far in excess to anything that had been predicted for this period.

Q Now, what was the condition-- excuse me. Strike that.

You say that the New York Stock Exchange had imposed some restrictions on Newburger Loeb because of its record-keeping problems in the back office, is that correct?

A That's correct.

Q And what was the nature of those restrictions?

A Newburger Loeb was limited as to the number of transactions that it was permitted to do in any given week. In other words, if the occasion had arisen, Newburger Loeb would have had to have turned down business. Newburger Loeb was prevented from expanding its business in any fashion. Newburger Loeb was prevented from soliciting business in over-the-counter securities, especially over-the-counter securities below perhaps $5 or $10 per share.

In other words, the basis of the restriction was to limit Newburger Loeb's business so that Newburger Loeb would not be inundated with other business and could put its house in order.

Q Now, this restriction was in effect when you joined the firm, is that correct?

A That is correct.

Q And when was it that you learned that Newburger Loeb was coming off these restrictions, as you put it?

A Well, Newburger Loeb came off restrictions somewhere in the third or fourth week of June 1969 and I would say that we were more than a little certain that we would be coming off at that time.

Q Now, you say that in connection with that event, that is, the lifting of restrictions, you had a long discussion with some of your partners?

A For two days, in the Hotel Barclay.

Q And as a result of that discussion, what happened?

A Well, we reported back to the executive committee what had emanated from the discussion, and as a part of the discussion, it was decided that since Newburger Loeb now wanted to go forth with its business, it might be more efficient to have one person, a managing partner, a title that did not exist in that firm, or a function that had not existed in that firm previously, to sort of hold the reins and see that all of the horses stayed on track rather than off in their own directions.

Q Now, when you say that there had not previously been a managing partner at Newburger Loeb, how far back do you go in time? Do you mean prior --

A To my knowledge, never. I knew that during the 1960's Mr. Morris Newburger was perhaps the dominant partner. But to my knowledge and from what I knew then and from what I have learned since, they have never had any one partner that they designated managing partner. And in fact when I was a partner with the firm prior to July, the firm was run by a five-man executive committee.

MR. SHAW: Objection. That is not responsive to any question.

A -- of which Robert Newburger was chairman.

MR. SHAW: Move to strike everything after "In fact."

THE COURT: Denied.

Q Now, did you accept the position of managing partner?

A I did.

Q And on what date did you become managing partner?

A I don't know the precise date. It was some time about mid-July of that year, 1969.

Q And did there come a time when you ceased to be managing partner?

A Yes.

Q How did that come about and when was that?

MR. SHAW: Objection.

THE COURT: What is the objection?

MR. SHAW: I think that is an invitation to hearsay: How did that come about?

THE COURT: Overruled.

A In July of 1970 it was requested that I meet with some of the younger partners, some of the newer partners. They were Mr. Settel, Mr. Ned Frank, Mr. Robert Therese, Mr. Charles Sloane and Mr. Fred Kayne. It was requested that I meet with them at a hotel on Central Park South, I believe the name was the Navarro. I am not precise about that. And at that time they suggested to me--

MR. SHAW: Can I have an objection with respect to Messrs. Risher and Aixala with respect to this conversation?

THE COURT: At this point, you may.

MR. GRUTMAN: May that likewise be applicable to the other additional defendants?

THE COURT: At this point this is admitted only against the partnership. Go ahead. And the participants in that meeting.

Go ahead.

A And at that time it was suggested to me that the firm --

MR. GLATZER: I don't want to be discourteous but I would like to have an objection to any conversation in which he said it was, "and they said," because there is no identification as to the speaker.

THE COURT: Mr. Gross, to the extent you can identify the speakers in these conversations, please do so.

A I think at that conversation, everyone spoke, and in that particular framework, I couldn't tell exactly who. In other frameworks, I can.

THE COURT: Very good.

A It was suggested to lme that I step down as managing partner because I had not been able to really successfully exercise certain controls over some of the other partners, some of the other senior partners along with me, and I responded that that was not at all contrary to what I was thinking at that time, because I had just that past weekend discussed with my wife and with others the possibility, or the probability, that I wanted to resign from the firm and was interested in doing so.

So I said to them that would be fine. "I'll be pleased to step down as managing partner. And in fact, I will at this time also resign from the partnership."

Q This was still at this conversation you were having with these named partners in the Navarro?

A Pardon me?

Q This was still at this conversation --

A This was some time at this same conversation.

They eachof them requested that I not resign from the partnership and that I stay on longer, and we had quite a bit of discussion about that.

As a result of that discussion and as a result of the meeting I agreed to stay on for a short while longer, and it was decided that Mr. Kayne would come to New York on the first Monday of August, that was August 3rd of that year, and that he would come to New York as the the assistant managing partner, thatI would take my vacation, which I had planned for two weeks, commencing August 14th, which would be the second Friday following and that when I returned from my vacation I would resign as managing partner in favor of Mr. Kayne, and that was how we left it as we left that meeting.

Q Was this information communicated to the other partners at any point?

A Yes. There was an executive committee meeting just prior to or just when Mr. Kayne came to New York, at which time the composition of the executive committee was changed somewhat to include Mr. Kayne, and I think, and I'm not sure of my details, Mr. Therese on a permanent basis, and I'm not sure whether Mr. Andrew Newburger and Mr. Leo Stern were then made alternates. I'm not sure of the exact composition, but it was communicated to the rest of my partners.

Q Did there come a time when you attended an executive committee meeting on August 24, 1970?

A Well, I was on vacation at that time. But I was spending my vacation at home. It was after I had actually resigned as managing partner, which I had done on August 11, and I came to New York for that meeting.

Q And what happened at that meeting?

A The meeting was called by Mr. Kayne, and it was held at the offices of Finley Kumble, I think, on Madison Avenue, and present at the meeting were, I think, all of the executive committee, the two alternates that I just mentioned, Mr. Robert Persky and a court stenographer.

Q You say a court stenographer was present?

A Yes.

Q Did Mr. Kayne have a prepared statement with him?

MR. SHAW: Objection.

THE COURT: What is the objection?

MR. SHAW: I think he is leading. "What did you say?" would be a correct question. It is a characterization.

THE COURT: Overruled. You may answer.

A Mr. Kayne opened the meeting by reading to us a 32-page prepared statement and he read from the statement

Q I show you Defendant's Exhibit S for identification and ask if you can identify it.

A This is Mr. Kayne's statement.

MR. MANDEL: I offer it in evidence.

MR. GLATZER: No objection on behalf of Mr. Kayne, but an objection on behalf of Mr. Muh, who was not present at the meeting.

MR. SHAW: And I object on behalf of Mr. Risher and Mr. Aixala as well as the corporation, your Honor.

MR. GRUTMAN: And I object on the grounds that although it is said that Mr. Persky was present when the remarks were made by Mr. Kayne, on the present state of the record there is no connection of binding force on Mr. Persky or Finley Kumble.

THE COURT: It was in the Finley Kumble offices.

MR. GRUTMAN: It could have been any place. But how do we become responsible for what Mr. Kayne said?

THE COURT: You may not be.

MR. GRUTMAN: All right. Very well.

THE COURT: I will admit it subject to connection against those who it is obviously not connected to at this point.

MR. GRUTMAN: Very well, sir.

xx (Defendant's Exhibit S received in evidence)

BY MR. MANDEL:

Q Now, was Mr. Persky present at this meeting?

A He was.

Q Do youremember whether you noticed anything in particular when Mr. Kayne read this prepared statement, Exhibit S in evidence?

A I noticed quite a few things. One of the things I noticed most, in fact, the thing most noted, was the fact that Mr. Kayne read the statement and included in the statement were words to the effect that he in no way reserved his right to legal action against the partnership --

Q What did you say?

MR. GRUTMAN: Let him finish before you lead him. I object, your Honor.

THE COURT: He hasn't led him. He just said, "What did you say?"

MR. GRUTMAN: He is interrupting him.

A He said, as a part of his statement, that he in no way gives up, forgoes his right for legal action against the partnership. He took the partnership to task for many things and the statement appeared to me --

MR. SHAW: Objection, your Honor.

A -- to be a declaration of war.

THE COURT: Sustained. Strike that last sentence.

MR. GRUTMAN: And I object to the interpretation of a document that is now in evidence.

THE COURT: I struck it out.

MR.MANDEL: Your Honor, he may state, may he not, what parts of the statement made an impression upon him?

MR. GRUTMAN: I object to that. It is not important as to what he thought was --

THE COURT: It may or may not be. I struck out his characterization of the instrument.

BY MR. MANDEL:

Q Now,had you ever met Mr. Persky before?

A I think I might have been introduced to him for a moment at the offices of Newburger Loeb before I had gone on vacation on August 14.

Q Was Finley Kumble connected with Newburger Loeb in any way prior to the time when Mr. Kayne became managing partner?

MR. GRUTMAN: I object to the phrase --

A No, sir.

THE COURT: What is the basis of your objection?

MR. GRUTMAN: "Connect in any way" is so loose an expression that it is really meaningless. I am sure that it is capable of being refined.

Were we general counsel, had we been retained, were we doing work? But to say "connected" is of a piece with subject to connection.

THE COURT: No connection.

MR. GRUTMAN: Exactly. That's fine.

THE COURT: The answer is no to that question. Overruled.

Go ahead.

MR. GRUTMAN: I was saying to Mr. Shaw that to be connected was a phrase that had been used in connection with one of Mr. Mandel's theories I found.

THE COURT: All right. Go ahead.

BY MR.MANDEL:

Q Now, did Mr. Kayne say anything at this meeting about Risher and Muh?

A Yes. He said that he had retained Risher, Muh & Company prior to his coming to New York to become assistant managing partner.

MR. GLATZER: I think we are again having characterizations of remarks that are written.

THE COURT: No. I think he is saying there is a statement that was made by him.

MR. GLATZER: But if the statement is in evidence, this is his recollection --

MR. MANDEL: I don't want to have to read this whole thing now,if I can avoid it. I can do it at another time.

MR. SHAW: I object.

THE COURT: Mr. Gross, is this separate and apart from this prepared statement?

THE WITNESS: My precise recollection is I think it was a part of the prepared statement, but I could not swear to it. I know it was said at that meeting.

MR. GRUTMAN: Your Honor, page 7 of the prepared statement now in evidence as Defendant's Exhibit 7 says: "At this point I would like to review our retention" --

THE COURT: We have this problem. Either we have to focus his attention on something that was said or we have to spend the time of reading a 32-page statement.

MR. GRUTMAN: I don't think those are the only altnernatives.

THE COURT: I don't know of any sensible one in between. If you have a suggestion --

MR. GRUTMAN: Yes, I do. I think Mr. Mandel, being as well prepared as he is, could focus on the precise language to which he wishes to invite the witness' attention rather than to use substitute verbal formulations.

THE COURT: I think --

MR. SHAW: I would think that if Mr. Mandel doesn'tread in a portion that we will probably read that portion.

THE COURT: I am sure it will at some point. But I want to get along with the examination and I think that in the interests of saving time, if we can get at a subject matter that was discussed at the meeting --

MR. GRUTMAN: Don't you see the difference between Mr. Kayne retaining Risher and Muh or the partnership retaining Risher and Muh? And that's why these words-- I am not making much of little. These are significant differences. And that's why I asked Mr. Mandel to take the care to use the proper word as it appears in the agreement. It makes a lot of difference on a number of theories.

THE COURT: Well, he has a point there, Mr. Mandel.

MR. MANDEL: I did not prepare this examination--

THE COURT: In that fashion --

MR. MANDEL: -- by picking out portions of this to read. If I am asked to improvise, I will do that. I don't think it is the sensible way to handle this. But I'm subject to the directions of the Court.

To my mind, even though there is a prepared document, a witness may testify with regard to what he heard. However, I will follow --

THE COURT: Let's do that at this point in the interests of saving time; if some gross error -- and no pun is intended at this point - if that is committed, it can be corrected, I am sure.

You asked him about somebody hiring the firm of Risher and Muh?

MR. GRUTMAN: Page 7.

MR. MANDEL: Yes. I think maybe the easiest way to do that is to read from page 7. I may have to do it again.

"3. Risher, Muh & Company. At this point I would like to review our retention of Risher, Muh & Company. Prior to my coming to New York on August 3rd, I developed an approach to gathering information quickly by" -- I should explain I am reading from Kayne's prepared statement, Exhibit S -- " I am trying to get facts in the shortest period of time so that I could begin evaluating a course of action. In this regard I wrote most everyone in supervisory positions at Newburger Loeb asking for specific information.

"I also retained the firm of Risher, Muh & Company as independent management consultants on behalf of Newburger Loeb to come into Newburger Loeb and assist in the information-gathering and verification process.

"Both Paul Risher and Bob Muh were management consultants with McKinsey & Company, a leading national consulting firm, and they consented to spend their full time as," it says, I suppose it should be at, "Newburger Loeb to give us their assistance and evaluation.

"Paul Risher was immediately assigned to the area of examining the profit and loss picture and evaluating our clearing operations.

"Robert Muh has devoted most of his time to the examination of leases and obligations, liabilities and space requirements inherent in this area.

"Today I have received a 20-page report from them which, although of a preliminary nature, outlines many of their findings and suggests various courses of action, some of which I have already instituted."

I am also going to read beginning at page 3 of the memorandum.

"II. The present executive committee and its relationship to the old executive committee.

"I think that it is important to begin at this time with a discussion of the relationship of the new executive committee and its responsibilities for guiding the firm from the day of its inception as relative to the old executive committee.

"I came to New York to assume my new job as assistant managing partner on August 3, 1970. The new executive committee had been formed the previous week but had not yet met.

"On August 11, 1970, the new executive committee had its first meeting and at that time Charles Gross resigned as managing partner and I was selected as the new managing partner of the firm by the new executive committee.

"On August 13, 1970, two days later, I appeared before the New York Stock Exchange and introduced myself, discussed Newburger Loeb's problems, got a feeling of their views, told them I was undertaking a quick analysis of Newburger Loeb and trying to get a handle on the various operations and difficulties of the firm. I told them I would be backto them in the near future with a complete report.

"I subsequently met with representatives of the Exchange together with some of my partners last Friday and gave them a partial report, including a letter regarding our future course of business. I have copies of that letter and will distribute them at the end of my remarks."

I am continuing.

"As most of you who were present at the first executive committee meeting on Tuesday, August 11, 1970 will recall, I made a special point of discussing and raising questions as to my responsibilities as managing partner in relation to problems that were not created by me or by various members of this current executive committee. It is this whole area that I wish to discuss at this point.

"I have been advised and I have told many of you individually that I had been advised to resign as a partner of Newburger Loeb. I have in the past objected and still do strenuously object to many of the actions and [illegible] that our partnership had taken, but I feel that resigning is an impractical course at this time because the partnership is very vulnerable to tremendous financial reverses and losses.

"I feel that only by my direction and involvement can I assure myself personally, and those partners that find themselves in a similar position, of moving forward and working out the various problems.

"Therefore, it is with great emphasis that I wish to outline that the new executive committee and myself constitute a fresh management team, which will take an objective view of the prior management's decisions, which involved us in various difficulties.

"I want to make it clear that by staying and fighting through these problems as managing partner and member of the executive committee, I and the other partners similarly situated do not in any shape or form waive any of our rights or remedies against any of the individual partners or against the partnership that we may have under the law, nor do we condone any of the prior actions or omissions of the partnership or the partners.

"I became a partner of the firm on March 1, 1970, and I signed the partnership agreement without questioning the representations made to me by men whom I respected and deemed to be honorable and truthful."

I will state here further, without reading, that Mr. Kayne's statement has a section IV:

"Deficits in general partners' accounts" -- and the section V "Basketball team" and a section VI "Lack of supervision" and a section VII "Lack of financial controls," and a section VIII "Establishment of a California office."

MR. GRUTMAN: 24, Mr. Mandel.

MR. MANDEL: A section IX "Louis Bracker," and a section X "One New York Plaza and other properties." And a section XI "Lack of full disclosure" which I will read:

"Shortly after arriving in New York, I was approached by a number of our general partners who were not members of the executive committee. They asked me questions as to capital, as to the operating results of the firm, and as to other matters that pertained vitally to their financial interests in the firm.

"It is apparent from reading the minutes of our executive committee meetings and from the questions posed to me by our other general partners that the actual financial condition of Newburger Loeb has not been fully disclosed to them.

"Full disclosure is required by our partnership agreement and the partners individually have the right at any time to examine the books of the partnership.

"Therefore, later in this meeting, I will propose a meeting of our general partners tomake this disclosure.

"I believe this lack of full disclosure permeates our relationship with the New York Stock Exchange and other regulatory agencies. I plan to institute proper disclosure of our activities to our business associates, partners and to regulatory agencies."

THE COURT: Mr. Mandel, would this be a good time to take a break?

MR. MANDEL: Yes.

THE COURT: We are going to sit late tonight, as you know.

(The jury left the courtroom)

MR. GRUTMAN: I sincerely hope this will be of some assistance to the Court. We shall pass out other copies to counsel (handing)

THE COURT: Mr. Shaw, you wanted to make a statement?

MR. SHAW: Yes, your Honor. The point that I wanted tomake is that I feel that the Court's reading and making a statement to the jury is, with respect to the issue of censure and fine, calculated to give the jury the impression that the Court is or has made its mind up or is favoring one side.

witness.

MR. MANDEL: In my view, which I would like to put on the record, your Honor was very kind to Mr. Shaw, and that if there is any balancing of the scale with the way that was handled by your Honor, it favored Mr. Shaw.

THE COURT: So I note -- you can make your statement on the record, but I think that it is not well founded.

MR. SHAW: Those are my views, your Honor.

THE COURT: All right.

(Recess)

(Jury present)

MR. MANDEL: May we come to the bench for one moment, your Honor?

MR. GRUTMAN: Mr. Shaw is not here.

MR. MANDEL: We don't need Mr. Shaw for this. We really don't.

(Discussion off the record at the bench)

MR. MANDEL: May I resume, your Honor?

THE COURT: Please do.

BY MR. MANDEL:

Q Mr. Gross, what happened after that meeting of August 24, 1970, when you heard Mr. Kayne read his prepared remarks?

A Well, as I testified, I was on vacation at that time. Mr. Kayne passed out copies of his remarks, I believe, at the meeting.

I went home. I reread them during the week. I pondered over them and I decided that the climate at Newburger Loeb seemed to be developing into something I had never been involved with before and that I didn't think a partnership should be all about --

MR. SHAW: Objection, your Honor, and move to strike everything after "decided" as state of mind.

MR. GRUTMAN: And self-serving.

THE COURT: Yes. In other words, I think it would be appropriate-- he studied the prepared remarks, is that right?

MR. SHAW: And pondered and decided.

THE COURT: And pondered them and then what happened?

Q Then what did you do?

A When I returned to work on Monday, August 31, I handed letters of resignation from the partnership effective September 30 to Mr. Kayne as managing partner, to Mr. Robert Newburger as chairman of the executive committee, and as I thought was required of me, a copy of each letter to the New York and American Stock Exchange.

Q I show you three documents marked FFFF for identification and ask you what they are.

A The top one is the copy of the letter to Newburger Loeb & Company which I handed to both Mr. Kayne and Mr. Robert Newburger.

The second one is a copy of the letter that I handed to the New York Stock Exchange telling them of my notice of withdrawal.

And the bottom one is a copy of the letter I handed to the American Stock Exchange telling them the same thing.

MR. MANDEL: Offer them in evidence.

Any objection?

MR. GRUTMAN: Yes. I don't think that they serve any useful purpose. The evidence establishes what the documents set forth. It is repetitive, cumulative.

MR. SHAW: I object on behalf of Aixala, your Honor.

THE COURT: It will be received.

xx (Defendant's FFFF for identication was received in evidence)

MR. MANDEL: I would just like to read them. It is just six lines or so. I will skip the address.

(Mr. Mandel read to the jury from Defendant's

Exhibit FFFF in evidence)

Q Now, what happened next, Mr. Gross?

A Well, within the next few days quite a number of the partners came in and asked me to withdraw my resignation. I remember in particular Mr. Robert Newburger came tome and said that he had not shown the letter to anyone and he did hope that I would retract it, and I informed Mr. Newburger that his was not the only copy of the letter, I had given a copy to Mr. Kayne and had then informed the New York and American Stock Exchanges of my intention to withdraw.

Q What happened next?

A I believe the date was September 8, 1970 that we held a meeting at the offices of Mr. Justin Golenbock of Golenbock & Barell at the request of Mr. Kayne, and Mr. Kayne came to that meeting with his attorney, Mr. Robert Persky.

Q Let's just establish that. This was a meeting about September 8, four people present?

A Myself, Mr. Golenbock, Mr. Kayne, Mr. Persky. There may have been some other partner of Mr. Golenbock's who sat there for a little bit. I don't remember definitely.

Q Who requested this meeting?

A Mr. Kayne.

Q And what happened at that meeting?

A Mr. Kayne told us that he had prepared or was preparing, perhaps even had already prepared, a plan for the purchase of the Newburger Loeb partnership.

Q And who was to buy it?

MR. SHAW: Objection.

THE COURT: Let him finish.

A On behalf of himself and some associates. I think he specifically said partners and others. And that he would like me to withdraw my resignation from the partnership because in the event that he could consummate the purchase, he wanted to deal with the purchase, he felt that I was someone with whom he could deal and he felt that he was ineffective and unable to deal with the Newburgers and Sterns and couldn't get any concrete answers from them, and, of course, in the event that he could not buy the partnership, he felt it would be a good thing if I stayed with it.

Q Did you make any response?

A I told Mr. Kayne that it was certainly not reason enough for me to withdraw my proposed resignation, my notice of resignation, and that I would not withdraw my notice.

Q Was anything further said?

A Mr. Kayne became quite excited and quite heated at that and he made personally harsh remarks about my not being willing to withdraw my notice, and it was on that note that the meeting broke up. And as the meeting was breaking up, Mr. Persky, who had been sitting there and generally quite quiet, he sat on a couch, which was a soft and deep couch, said to me, "Well, you know, Charlie, we can make it so that you will be sorry you didn't do what Fred asked."

MR. SHAW: Object and move to strike on behalf of Aixala, Risher and corporation.

THE COURT: I'll take it subject to connection against those it isn't obviously connected with.

MR. GRUTMAN: Can I hear the answer read back?

(Record read)

BY MR. MANDEL:

Q Was that the end of the meeting?

A That was.

Q What happened next?

A Within the next week, Mr. Robert Stern requested an appointment with myself and Mr. Golenbock and we had such a meeting with Mr. Robert Stern, his attorney, a Mr. Dan Kaplan, Mr. Golenbock and myself.

Q Where was this meeting held?

A In Mr. Golenbock's office.

Q And what happened at this meeting?

A Mr. Stern came for the express purpose of asking me to withdraw my proposed resignation. He told me of Mr. -- of the receipt of Mr. Kayne's proposal to purchase the firm. He told me that he and hispartners were not disposed to accept this offer and that, in the event they did not accept the offer, that Mr. Kayne might very well then leave the firm, and they wanted me back and, he intimated, again in the position as managing partner.

Q How did you respond to that?

A I told him the same thing I had told Mr. Kayne, that I was not disposed to withdraw my resignation.

Q What happened next, Mr. Gross?

A It must have been -- I could only think that the date was November 17 or November 18 -- that I either personally received a notice, because I had power of attorney from my sister Jeanne Donoghue, or I was informed by Miss Bleich that a meeting was being called of the limited partners and others because of a suspension warning letter that they had received from the New York Stock Exchange.

I was aware that as a withdrawn general partner -

MR. SHAW: Objection to everything after "I was aware," your Honor; state of mind.

MR. GRUTMAN: And not responsive to anything.

THE COURT: Yes. Put another question, Mr. Mandel.

Q Did you attend the meeting?

A No, I did not.

Q Did you do anything else instead?

A I contacted Mr. Golenbock at Golenbock & Barell and I told him--

MR. SHAW: Objection to everything after "I told him."

MR.MANDEL: This is not to prove the truth of what was said but to explain what happened.

MR. SHAW: I object, your Honor. It is prejudicial. It is difficult to disassociate what is told for the purpose of evidence and what is told just for the purpose of establishing a statement.

MR. MANDEL: Your Honor, this is merely a question of instruction to an attorney or retaining of an attorney.

MR. SHAW: We will stipulate that he was retained.

MR. MANDEL: No. It is a proper question and

I think Mr. Gross should be permitted to answer it.

THE COURT: I'll permit it to be answered. This is not for the truth of anything contained in it, ladies and gentlemen, but I take it this is the next step along the way.

MR. MANDEL: That's right.

THE COURT: Mr. Mandel, come up here, please.

Mr. Shaw, would you kindly attend, please?

(Discussion off the record at the side bar)

(In open court)

THE COURT: The objection is withdrawn.

BY MR. MANDEL:

Q Continue.

A I told him of the notice I had received of the meeting and that I thought that as a withdrawn general partner I had a position in relationship to my sister that would make it unethical for me to represent her at such a conference --

MR. SHAW: Objection. This is not what the offer was. It is self-serving. It is highly prejudicial. It is different--

THE COURT: How is it highly prejudicial? What is the prejudice in that?

MR. SHAW: I think there is an issue here as to whether he was representing his own interests or representing the interests of Jeanne and Mabel. I think there is a question as to --

THE COURT: What is the prejudice?

MR. SHAW: It is the prejudice, your Honor, and it is hearsay. It came in only because of the assertion --

THE COURT: I don't see the prejudice in it. It is on really a very peripheral issue getting down to who is representing whom.

MR. SHAW: Mr. Mandel -- I withdrew my objection. However, in view of this content, I reassert my objection.

THECOURT: No. I am going to permit it. I don't see that this has any of the prejudice that you claim is in it.

A In any event, I requested they please have someone attend the meeting and to represent Jeanne and to contact Mabel and to represent her if she would desire it, and that I would not attend.

As a result of this, a partner of Mr. Golenbock's, a Mr. Donald Shack, attended the meeting.

Q What happened next?

A Mr. Shack reported that there was a meeting called for the next day.

MR. SHAW: Objection.

THE COURT: Sustained.

Q Did you attend the meeting the next day as a result of the report you received?

A I did.

Q And what was the purpose of your attending the meeting?

MR. SHAW: Objection. State of mind.

A Well, the meeting was called --

MR. SHAW: Objection.

THE COURT: He went to the meeting. Go ahead.

A THe meeting was obviously for the purpose of soliciting from the limited partners and subordinated lenders extensions of any notice that they had given for the withdrawal of their capital.

Q At that time did you hold a power of attorney from Jeanne Donoghue?

A I did.

Q Was she in Australia at the time?

A She was.

Q At that time had she submitted any notice of withdrawal of capital?

A She had not.

Q Did you state that fact at the meeting the next day?

A I did.

Q What was the response?

A I questioned what good it would do for me to sign such an extension on behalf of my sister because she had never even given a notice of withdrawal, and --

Q Whom did you question? Do you remember?

A Whomever might have been sitting next to me or perhaps Mr. Steefel who was conducting the meeting. And they responded that it would really look godd for the Stock Exchange if Jeanne -- if I signed for my sister on her behalf and if Mabel signed on her own behalf despite the fact that they had not given notice of withdrawal because it would be an indication of the solidarity of the limited partners in this situation.

So I did sign that request for an extension, which I believe was a request for a 30-day extension of the warning letter that had been received.

MR. GLATZER: We are faced with the problem of a "they." We don't know who was at this meeting and we don't know who was speaking.

I move to strike on that basis.

THE COURT: Mr. Steefel was identified as one.

Anybody else?

THE WITNESS: I know Mr. Frank was at the meeting. I know Mr. Levy was at the meeting. He was a trustee. Estate of Morris Newburger. I know Mr. Donald Newborg was at the meeting. Mr. Willard Irle was at the meeting.

THE COURT: Mr. Gross, who made the statement "It would look good for the Stock Exchange" and so on?

THE WITNESS: I truthfully cannot precisely point a finger.

THE COURT: All right.

MR. GLATZER: I make a motion to strike.

THE COURT: No.

Was this in the meeting generally?

THE WITNESS: Yes. We were sitting at a conference table.

THE COURT: Denied.

MR. GLATZER: Has it been established that at least any of my clients were there? I don't know if any of the other defendants on the counterclaims were there.

THE COURT: That may be. I'll permit it to stand.

Q Going back, Mr. Gross -- I am going to show you some documents. I show you GGGG for identification and ask you to state what that is.

A This is a copy of a letter I wrote on September 29, 1970, the day before my resignation was to become effective, in which I gave notice that I hereby withdraw all of my additional capital and require that payment of the full amount of my additional capital be made tome forthwith.

I sent this to the executive committee, Newburger Loeb & Company.

MR. MANDEL: Offer it in evidence.

Any objection?

MR. SHAW: Objection on behalf of Aixala.

MR. GLATZER: Objection on behalf of Muh.

THE COURT: It will be received.

MR. ESTERMAN: Objection.

xx (Defendant's Exhibit GGGG received in evidence)

Q What is HHHH, Mr. Gross?

A This is another letter I wrote to Newburger Loeb & Company on October 28, 1970, in which I referred to the articles of limited partnership and demand is hereby made for the payment of 15% of the amount of committed capital standing in the name on the books -- in my name on the books of the partnership at the effective date of my withdrawal as a general partner of the partnership. And I further reminded them--

MR. SHAW: Objection, your Honor. Don't these letters speak for themselves?

THE COURT: Yes.

MR. MANDEL: I offer it.

Q I show you IIII, Mr. Gross, and ask you to state what that is.

A This is a letter in which I demand the payment--

Q What is the date, please?

A October 28, 1970, to Newburger Loeb & Company and I demand payment of the interest that had accrued to my account from July 1, 1970.

Q Does that bear a receipt on it?

A "Received by Fred Kayne, partner, for Newburger Loeb & Company."

MR. MANDEL: I offer it.

MR. SHAW: I object to both of these defendant's documents on behalf of Aixala.

MR. GLATZER: I object.

THE COURT: Received, subject to connection, where there is an objection.

xx (Defendant's Exhibits HHHH and IIII received in evidence)

Q I show you Defendant's Exhibit N and ask what that is.

A This is a letter I wrote to Newburger Loeb & Company on November 23, 1970 in which I state--

MR. SHAW: Objection.

A -- the demands I had previously made.

MR. MANDEL: I offer it.

MR. GLATZER: I object on behalf of Mr. Muh.

MR. SHAW: Same objection that I previously made, your Honor.

MR. ESTERMAN: Same objection as before.

THE COURT: I'll take it subject to connection.

xx (Defendant's Exhibit N for identication was received in evidence)

Q Mr. Gross, from the date of your resignation from Newburger Loeb & Company to the present day,have you received back one penny of your capital?

A I have received neither capital nor interest.

Q Now, you -- before I went back with these exhibits, had been telling us about a certain meeting where you signed an extension on behalf of your sister Jeanne.

Am I right that you fixed the date of that as some time in November?

A I think it was November 19.

Q What happened next, Mr. Gross?

A Some time just after the middle of December, I received a telephone call from Mr. Golenbock and I was informed --

MR. SHAW: Objection to everything after the word "informed."

MR. MANDEL: I'll rephrase it.

Q As a result of that telephone call, did you do anything?

A I retained you, Mr. Mandel, as my attorney.

Q In connection with what?

A In connection with the proposed reorganization or should I say the proposed transfer of the assets of Newburger Loeb, the partnership, to a new corporation known as Newburger Loeb & Company, Inc.

Q At that time, in December, was any written proposal called to your attention?

A Yes, sir.

Q Do you have that?

A No, I don't have a copy of that. It has been in evidence in this courtroom. It was, I believe, given to you and you showed it to me. It was the letter and proposal of December 17, 1970, under cover of a letter by Mr. Robert Newburger to the New York Stock Exchange.

MR. SHAW: I placed that in evidence, your Honor.

Q I show you Defendant's Exhibit V.

Mr. Rothman, you say this is in evidence?

MR. ROTHMAN: Under a different designation, another copy of that.

Q I show you Defendant's Exhibit V for identification and ask you if this is the document you refer to.

A This is the copy of the document.

MR. MANDEL: Shall I mark this, just to make sure that we are not missing --

MR. SHAW: If you show it to me --

MR. ROTHMAN: It is in evidence as Plaintiff's Exhibit 97.

MR. MANDEL: I think it is in evidence, too, but I think the record should identify it.

MR. SHAW: I think it is in evidence, your Honor. If you want to wait, I'll find it.

MR. MANDEL: Mr. Rothman says it is Plaintiff's Exhibit 97. Subject to correct, let's do it that way.

THE COURT: All right.

Q What happened next, Mr. Gross?

Directing your attention to January 15, I ask if anything happened on that date. That is January 15, 1971.

A You informed me--

MR. SHAW: Objection. What Mr. Mandel or somebody informed him --

MR. MANDEL: He is talking about a meeting.

MR. SHAW: That is different from what he is saying.

THE COURT: When is this, now?

MR. MANDEL: January 15.

THE COURT: Yes?

MR. MANDEL: 1971.

Q What happened on that date?

THE COURT: What happened?

A I attended a meeting at your office. The meeting was attended by myself, Mr. Mandel, Mr. Robert Persky, Mr. Robert Newburger, Mr. Paul Risher.

Q And what happened at that meeting?

A Mr. Risher -- well, of course they came, and Mr. Risher or Mr. Muh told us that they had asked for the meeting so that they could guide us through the balance sheet and show us --

Q The balance sheet of what?

A Of Newburger Loeb & Company, and show us the condition of Newburger Loeb & Company as they represented it to be, and to show us this for the purpose of impressing upon us the seriousness of Newburger Loeb's plight.

You informed the that I had recently enough been a partner of Newburger Loeb that I was quite familiar with the affairs of Newburger Loeb until such time as I resigned as a partner, which would be September 30, 1970, that I had a very good grasp on what had been the general tenor of this Wall Street-- and in the intervening few months, and that I had a very good idea of what had been the progress or condition of Newburger Loeb during thatitme, and especially with this change from a clearing to a nonclearing entity that I was not interested, and that you and I were not interested in going through their balance sheet, that we had our own opinions as to what the conditions of the firm probably realistically were.

Q Was this meeting of January --

MR. GLATZER: I move to strike on behalf of Kayne and Sloane, who were neither partners nor in attendance at the time of the meeting.

THE COURT: No, I'll take it subject to connection.

Q In this meeting on January 15, was any reference made to a plan for the sale of the assets of the business?

A Well, at this time they already had -- and I don't know whether you had already received it or received it at that time -- the -- what has been called the draft agreement of December 30 or 31, 1970 was already in existence.

Q And did they solicit your approval on behalf of that agreement?

MR. SHAW: Aren't we leading at this point, your Honor?

THE COURT: Yes.

What did they say about it?

Q What was said about that agreement?

A Well, they, I think, knew at that time that Mrs. Donoghue was declining to go along, and Mr. Persky said that it would be in my best interests, in his opinion, to go along with the deal as it was structured, go along, therefore, with a deal in which I was specifically excluded from any consideration for my capital, to go along with that deal as it was structured and to convince my sister to go along and to convince Miss Bleich to go along because they had many claims that they might bring against me, there was a Buckley claim, there were other claims, and it would be in my interests not to be tied up in litigation for a long,long time, and to be free to work in the street as I saw fit.

I at that time stated that I had no interest in their deal, that I thought their deal was designed to steal the firm from the people who had money in the firm, that they had proffered a deal in which the general partners would be bribed for giving the control of the company to new people who had very little money at stake, that these new people would have the use of almost five million dollars worth of assets at substantially no risk at all from which they could only profit handsomely, that in payment for getting this use, the general partners would receive large forgivenesses of their indebtedness, and I had no interest in the deal, I wanted no part of the deal, and that if they just give me my money, they could keep their claims against me, they could have it both ways.

And Mr. Persky came back and very strongly said that there is this Buckley claim that I was personally involved in that they had gotten from the Buckleys, that there are other allegations of malfeasance, and while Iwas a partner of the firm, and that these are to be taken very seriously by me, he wanted me to take them very, very, very seriously.

And he suggested that I was not taking them seriously enough.

And he told us again, of course, that if we stood in the way of the deal that I would be involved in nothing but suits for a long, long time thereafter, if not almost forever.

I remember that the parting remark, on my part at least, was that I invited him to keep his claims against me and that I, rather than go along, would much prefer that the partnership go into liquidation and I thought that would probably be fairest and best for everyone concerned.

Q Did Mr. Mandel say anything about the claims against you?

A Mr. Mandel indicated similarly that these claims were, in his opinion, from what he had heard of them, frivolous, without substance, and that as long as I received my capital that was at stake in the firm, or if they chose to go into liquidation, it didn't matter, they could keep their claims, we were not going to bargain away just for a release from this kind of threat.

Q Now, who left the meeting first?

A Mr. Kayne- - I'm sorry, Mr. Mugh, Mr. Risher and Mr. Persky left and we remained in the office discussing --

Q You and Mr. Mandel, you mean by "we"?

A Correct.

Q What happened next?

A Within about ten minutes I received a telephone call from Mr. Charles Sloane in California. Mr. Sloane informed me that they had just received a report.

Q Who is "they"?

A He and Mr. Kayne. That he and Mr. Kayne-- I'm sorry, Mr. Kayne was in that office with them -- had just received a report from Mr. Persky, or one of the other participants in the meeting, of our meeting with him, and he said to me-- he told me that "Charlie, I've lost money here. If you kill this deal, we are going to sue you. You will be sued for a long time. You may never get out of the courts."

Sloane started to get quite hysterical and I distinctly remember holding the phone out so that you could hear the voice from across the room, and I never did get a chance to respond to him. He hung up.

MR. SHAW: Your Honor, is it understood that these two conversations, the conversation in the office and over the telephone, are subject to connection?

THE COURT: Yes. Those are not organized meetings involved. That is correct.

Q Mr. Gross, what happened next?

A About a week later, I believe the date was January 23, I received a telephone call from Mr. Fred Kayne and he asked me to meet with him over coffee after the market closed in Schraffts Restaurant in Broad Street.

Q And did you have that meeting with Mr. Kayne?

A I did.

Q Who was present?

A Just Mr. Kayne and myself.

Q What --

MR. SHAW: Same objection, your Honor.

MR. GRUTMAN: Same objection.

THE COURT: I'll take it subject to connection.

Q What did he say and what did you say?

A Mr. Kayne told me that he wanted me to withdraw my objections to their deal, that the deal would go through whether or not Mrs. Donoghue gave her consent, that he had prepared or was in the process of preparing suits against me in California and that, of course, if I consented to the deal, he would not file such a suit.

I told Mr. Kayne that I had no more stomach for the deal then than I had previously, that I felt that the firm could be liquidated and I felt certain that for my personal behalf that if the firm were liquidated my position was such that I would receive payment of my capital.

That was the essence --

Q Did you make any mention of the limited partners in liquidation?

A Well, besides receiving my capital, I also informed him that I thought that most everyone who still had capital in the firm would get it out. And I think I also reminded him of the debts of the general partners as one of the sources of additional capital for the partnership.

Q Now, were the staements that you made to Kayne about your opinion as to what would happen in liquidation your honest opinion?

A It was.

Q Is that still your opinion, Mr. Gross?

A It was my opinion then. It is my opinion now.

Q Will you explain your opinion?

MR. SHAW: Objection.

THE COURT: What is the reason for the objection?

examined and that is revealed, that goes then to the weight to be given his opinion.

I overrule the objection.

Mr. Esterman, are you going to be using this from time to time or shall I just hang on to this?

MR. ESTERMAN: You may hang on to this.

THE COURT: What is the question now?

MR. GRUTMAN: Give us your reason for the opinion that everybody would get their money out in liquidation.

MR. MANDEL: I didn't say quite that.

THE COURT: Do you have the question in mind?

MR.MANDEL: Yes.

THECOURT: Can you put it again?

Q What was the basis for your opinion?

A I at that time had seen some of the balance sheets that were being proffered by the persons running the affairs of the partnership and it has since been confirmed by my study of the Peat Marwick Mitchell --

MR. GRUTMAN: Objection, your Honor. That can't be a basis of an opinion then.

MR. SHAW: He is testifying with respect to his opinion then, I understand.

THE COURT: Yes.

I sustained that objection.

MR. MANDEL: He said then and now.

MR. SHAW: Then I object on the ground of form.

THE COURT: No. Let's stick with one time or the other.

I sustain that objection. All right.

Mr. Gross, what was the basis for your opinion? This is in or around the 15th of January, 1971.

THE WITNESS: Well, my own interpretation of the figures that were being presented in the various balance sheets that were being proffered, mostly by Mr. Risher and Mr. Muh to the meetings, some of which Mr. Mandel attended and which I had seen these balance sheets, my personal belief of what the true state of the affairs of Newburger Loeb was, the fact that I knew that the immense sums of money were owed by general partners, each and every one of whom would be receiving large tax refunds and my knowledge of what happened to various aspects of a brokerage firm, especially a non-clearing brokerage firm, one of which I had personally liquidated, Gross & Company, what happened to a nonclearing brokerage firm as regards to the assets of the trade and what had been happening in the street regarding the purchase and sale of producing officers by various firms because,as I have explained,many firms were in this kind of trouble and their offices were being sold between one and the other,had in fact made an offer of my own to MacDonald & Company to purchase an office of theirs, had the benefit of knowledge of what-- of the terms on which the lease obligation that Newburger Loeb had entered at one New York Plaza and the terms on which that had been settled, with a partial reference to other lease obligations.

There was a fund of knowledge that I had generated in twenty some odd years in the street from managing my own firm, from managing Newburger Loeb & Company, from being aware of the customs and practices and what was happening in the street, that led me to the opinion that a liquidation of a firm such as Newburger Loeb, which was a nonclearing firm at that time, would be much different from the liquidation of a clearing firm.

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THE COURT: You think it would be a good idea to take a five minute break here?

Ladies and gentlemen, we are prepared to sit late tonight. Do you think a five minute break might be in order?

MR. MANDEL: I think that would be in order.

THE COURT: We will take a five minute recess.

(Recess)

(In open court - jury present)

THE COURT: Proceed.

BY MR. MANDEL:

Q How did your meeting with Mr. Kayne end?

A A total lack of the meeting of the minds. I had stated my position; he stated hisp there was nothing really further to be said and nothing really further was said.

Q Now, I am not asking you, Mr. Gross, to tell us about meetings that occurred during February that you did not personally attend, but did you personally attend any meeting in February of 1971 with regard to the proposed Newburger, Loeb deal?

A I attended a meeting at the offices of Golenbock & Barell, I think on the afternoon of February 28, 1971.

Q Who was present at that meeting to the best of your recollection?

A A host of people. Yourself, Mr. Silverman, Mr. Persky, Mr. Muh, Mr. Robert Newburger, and attorney for Robert Newburger, a member of the Rosenman firm, and I don't know whether it was Mr. Burak or not; I think Mr. Andrew Newburger, Mr. Albert Dworkin, Mr. Dworkin's attorney, a Mr. Lewis, Mr. Donald Newborg, Mr. Arthur Richenthal, Mr. Ned Frank, I think Mr. Robert Stern.

I don't remember who all else.

Q Was Mr. Risher present?

A I do not believe so.

Q Was Mr. Muh present?

A I mentioned him.

Q Mr. Persky?

A Yes, sir.

Q And what occurred at that meeting?

A An effort was made to reach some accommodation between my position and that of the people who wanted to go forth with the transfer, and a plan of--

Q About how long did the meeting last?

A Certainly a few hours. I can't be precise. There was much discussion back and forth and a plan by which we might settle our differences was tentatively fixed.

Q And did the meeting end on that note?

A It did.

Q And was it understood that the proposals were subject to approval by others not present at the meeting?

A That is correct.

Q And --

A That was on their behalf. Mrs. Bleich was present at the meeting. On our behalf there were no further persons to consult.

Q And subsequently were those proposals rejected by others who were not present at the meeting?

A Starting the next day and then certainly within the 48-hour period we started to hear that the agreement probably would not be acceptable to everyone.

First we heard it was one person objecting, then another,and ultimately we heard that it was Mr. Kayne objecting. The first persons were Mr. Roggenburg and Mrs. Shirley Newburger.

Q What happened next?

A The deal went through and on February 16, 1971 I was served with a summons and complaint that commenced this action.

Q On the Buckley matter?

A The Buckley claim of Newburger, Loeb, Incorporat as assignees of David and Mary Buckley versus Charles Gross, Mabel Bleich and Gross & Company.

Q Were you also served with papers in a California litigation?

A Yes, yes. On the night of February 8th in fact I was served at home with papers -- I guess you call it a summons and complaint -- filed by Mr. Kayne and Mr. Sloane in federal court in California.

Q Now, what was the ultimate disposition of the California litigation?

MR. SHAW: Objection. Isn't it in evidence already?

MR. MANDEL: I withdraw it. We have it before the Court.

Q The complaint that was served on you regarding the Buckley matter was served on behalf of whom as plaintiff?

A Newburger, Loeb & Company, Incorporated.

Q And when that was served on you were any claims against you asserted other than the Buckley claim?

MR. SHAW: Objection, your Honor. The pleading speaks for itself. This is just argument.

THE COURT: That has been established, Mr. Mandel. Sustained.

Q Mr. Gross, I would like to talk about the history of the Buckley claim. Was Buckley a customer of

Gross & Company while Gross & Company was clearing through Newburger, Loeb & Company?

A For a portion of the time.

Q During what period?

A Buckley did business with Newburger, Loeb through Gross & Company probably commencing in the spring of 1962 through the close-down of trading of Westec in the latter part of August 1966.

Q Now, did you personally ever have any contact with Mr. Buckley or Mrs. Buckley?

A I never met nor spoke with Mr. or Mrs. Buckley prior to Mr. Buckley's appearance in this courtroom or in the courtroom upstairs at the outset of this trial.

Q Many long weeks ago.

A Pardon me?

Q Many long weeks ago.

Now, Mr. Gross, will you explain the term clearing house.

A The term clearing house?

Q Clearing house.

MR. GRUTMAN: We have had all this before, your Honor.

THE COURT: This would be cumulative.

MR. MANDEL: Let me just ask one question, to quote a famous one questioner.

Q Based on your experience and knowledge of the customers of the trade, which house is the broker of record, the clearing house or the originating house?

A No question it is the clearing house.

Q Now, which house has the responsibility for compliance with the rules of the Stock Exchange and the appropriate regulations of the United States and the Securities Exchange Commission?

MR. SHAW: Objection.

MR. GRUTMAN: We have had this too, your Honor.

MR. SHAW: The witness has --

THE COURT: I sustain the objection.

Q Now, during the time that Gross & Company was clearing with Newburger, Loeb & Company, were you aware of any activities on the part of Newburger, Loeb & Company in connection with compliance?

A Yes.

Q What were those activities and practices?

A I was personally aware that, for lack of a better phrase, a blotter, a compendium of every transaction made on behalf of a customer through Newburger, Loeb & Company, whether made by Newburger, Loeb's own personnel or through one of the many firms that cleared through

Newburger, Loeb & Company. Such a blotter was given to Mr. Morris Newburger and Mr. Robert Newburger every afternoon as quickly as it could be prepared or completed after the close of trading.

Trading in those days ended at 3:30 p.m. It generally would be on their desk at about 4:15.

I know that these lists of transactions were daily reviewed. I know that when any of the partners of Newburger, Loeb had any question relevant to any transaction made by, say, a member of my firm or an employee of my firm, it would most often go directly to the person whose account or who handled the account. Not necessarily to me, not necessarily to a partner but directly, if it was an employee, to that employee inquiring directly of the employee about the trade --

MR. SHAW: Objection, your Honor. This is not evidentiary. This is testimony with respect to a procedure that sometimes may occur and sometimes might not occur.

THE COURT: He is testifying to the practice as he saw it in Newburger, Loeb when he was in their space on their floor.

MR. SHAW: My objection is that it is not with respect to a practice. It is with respect to something that sometimes occurs.

THE COURT: I will let you cross examine on that.

THE WITNESS: I know that when the New York Stock Exchange or the American Stock Exchange or the Securities Exchange Commission or any regulatory body had any question concerning activity in a stock, they went to Newburger, Loeb for their information concerning the transaction.

Newburger, Loeb, through one of its partners, usually Morris Newburger, sometimes Leo Stern or Robert Newburger, would generally go directly to the registered representative, the person involved in handling the account, would get that information and transmit it to the regulatory body. The regulatory body, generally the Stock Exchange, looked to them for the information; did not look to Gross & Company. And, of course, Newburger, Loeb had a very effective control in that all orders went through Newburger, Loeb's order room to a partner of Newburger, Loeb on the floor of the New York Stock Exchange.

And very often any order so transmitted -- not very often, in terms of number of orders, but when it occurre the head of the order room or perhaps a Newburger, Loeb partner on the floor of the Stock Exchange would directly call to question an order.

Q You mean --

A They had control of the order before the transaction took place.

Q If there was any question they would raise it; is that correct?

A That is correct. Sometimes a question would arise later.

Q Now, during 1962 at any time did anybody in Newburger, Loeb & Company raise any question with regard to any transaction or any series of transactions in the Buckley account?

A No, sir.

Q Anytime in 1963 did anybody in Newburger, Loeb & Company raise any question about any transaction or any series of transactions in the Buckley accounts?

A No, sir

Q In 1964, did anybody in Newburger, Loeb & Company at any time raise any question about any transaction or any series of transactions in the Buckley accounts?

A No, sir.

Q Is that same true of '65?

A Yes, sir.

Q Is the same true of '66?

A Yes, sir.

Q Now, are you familiar with what happened to Westec?

A Yes, sir.

MR. MANDEL: Your Honor, I am going to ask the Court to take judicial notice of two cases involving Westec which give the background to what happened there which I think is important to an understanding of this case.

MR SHAW: Objection.

MR. MANDEL: This Court is certainly -- empowered to take judicial notice of public facts, including facts set forth in judicial decisions.

MR. GRUTMAN: I don't believe that is something which is the subject of judicial notice, your Honor.

MR. SHAW: In fact I don't think there is any question regarding that, your Honor, and Mr. Mandel's argument before the jury has no basis whatsoever.

You take judicial notice of statutes and law, not decisions which set forth facts in other cases. This case is to be tried on the evidence here.

THE COURT: Relying on Mr. Esterman's Bible here, let me have a look.

(Pause)

MR. SHAW: Your Honor, could Mr. Mandel furnish us with a copy of the proposed evidence as well so we could be looking at it while the Court is looking at it?

Is there more than one decision?

MR. MANDEL: Yes, two decisions about the Westec scandal which set forth --

MR. GRUTMAN: Please, Mr. Mandel.

MR. MANDEL: Please what?

THE COURT: Gentlemen, be quiet please.

Mr. Mandel, I think I would have to do some pushing to get these opinions into Rule 201-B. Therefore, at this point in my discretion I am going to exclude them.

MR. MANDEL: Would your Honot take newspaper accounts?

MR. SHAW: I'd object to that; newspaper, televisi and radio too.

MR. MANDEL: How are we to prove what happened in Westec?

MR. SHAW: I would like to have no more argument with respect to this fact so Mr. Mandel can get some opportunity to put in something that comes from a newspaper article before the jury.

THE COURT: Mr. Shaw, let's not have any argument of this kind.

Mr. Mandel, all I am prepared to say is that I do not accept these authorities under the rubric of judicial notice.

MR. MANDEL: Will your Honor hold this open overnight?

THE COURT: I will. I will hold the subject matter overnight.

MR. GRUTMAN: Judge, I die gracefully. Can't Mr. Mandel do that?

BY MR. MANDEL:

Q Mr. Gross, are you familiar with what happened with the Westec stock?

A I am.

Q Will you tell us what happened?

MR. SHAW: Objection.

THE COURT: Overruled.

MR. SHAW: Isn't this a way of getting in hearsay? Maybe it is based on what he heard on the radio or from television.

THE COURT: Let's see what he heard. Mr. Jordon was asked what happened to it, Mr. Newburger was asked what happened to it. Mr. Gross may be asked, to the extent it is competent, what he knows what happened to it.

MR. SHAW: At the present time or then?

THE COURT: I do not know.

MR. SHAW: I object if it is at the present time, your Honor. That is just hearsay.

THE COURT: Overruled.

THE WITNESS: I observed that in a period of very few days near the latter part of the life of Westec as a listed security on the American Stock Exchange --

THE COURT: This is 1966?

THE WITNESS: Yes, in 1966, during August of 1966, the price of the stock dropped rather sharply, which is not necessarily rare occurrence for a volatile stock; that upon arrival in work in the latter part of August the announcement was made that Westec trading had been suspended by the American Stock Exchange, shortly followed by an announcement of suspension from all trading of any kind of the Securities and Exchange Commission.

From that point on many stories started to eminate --

MR. SHAW: Objection, your Honor, to stories.

THE WITNESS: -- from the press about official reports concerning --

THE COURT: I am not going to let you get into what the stories are at this point.

Q Did Westec remain barred from trading for a period of years?

MR. SHAW: All that has been established, your Honor.

A Westec was barred from trading until May 1969.

Q Between the time Westec was barred from trading in 1966 until you joined Newburger, Loeb & Company in 1969, did Newburger, Loeb & Company or any of its representatives ever make any demand or request of you or Gross & Company that Newburger, Loeb be reimbursed because of any of its losses or because of anything in the Buckley account?

A They did not.

Q And that is true during the entire period from the middle of '66 until the beginning of 1969; is that correct?

A That is true from that period through February 16, 1971.

Q Now, if Newburger, Loeb & Company had asserted any claim against you or Gross & Company with regard to the Buckley account or Westec, would you have become a partner of Newburger, Loeb & Company?

MR. SHAW: I object. It is speculative. It is the state of his mind. It is self-serving. He can say anything and there is no way to cross examine a witness on that, what would he have done if.

MR. MANDEL: The state of the mind is like the state of the stomach. It is subject to cross examination. It is a vital fact in this case.

MR. GLATZER: This is a negative fact. If something would have happened what would you have done.

THE COURT: I think in this case I am going to permit it. You may answer it.

A Obviously not. I don't think they would have asked me and I know I would not have accepted an invitation to become a partner if they were suing me or dunning me for monies of any kind.

Q Did you have any responsibility in your view to Newburger, Loeb & Company for any of their losses on the --

MR. GRUTMAN: Objection, your Honor.

THE COURT: Sustained.

Q What knowledge did you have of the Buckley situation during 1969?

A Well, when I -- I think I had an awareness that this was still an open account on Newburger, Loeb's book. I think I knew that Newburger, Loeb had set up their own reserve against the debit balance that was owed and I don't know really what else I knew. This was not my affair. I did not handle it. I knew it was being handled by Mr. Leo Stern, for instance. And I had the awareness, or what have you, that it was sort of lying fallow until such time as Westec reopened.

Q When Westec reopened, and by that I take it you mean was readmitted to trading?

A Yes, readmitted to trading as Texsim Corporation.

Q Did you have anything to do with any decision on the part of Newburger, Loeb?

A I was in no way involved.

Q Do you know who it was in Newburber, Loeb & Company who was handling the Buckley account at that time?

A As I testified, Mr. Leo Stern. I was aware that Mr. Leo Stern was handling it and what Mr. Leo Stern subsequently did tell me is that he had ordered the stock not to be sold.

MR. GLATZER: I think there might be a lead man statute problem with that.

MR. GRUTMAN: He is a party. It has to come in even though we object to it.

THE COURT: I will think about that but I do not see that.

Q Did there come a time when you directed that the Buckley debit be pursued more forcefully?

A Yes.

Q When was that?

A I think that was in the latter part of 1969 after I had become managing partner. Very probably brought to my attention by the Peat, Marwick, Mitchell audit as of November 2nd when I realized that this item was still outstanding and the stock had long since reopened for trading and I felt it was certainly incumbent upon Newburger, Loeb & Company, of which I was managing partner, to pursue the Buckleys for a payment of their debit balance.

And I encouraged or I spoke about it and I think that I encouraged Mr. Stern and Mr. Miles, who was then in our employ, to pursue it more forcefully.

Q Now, do you recall a meeting with Mr. Jordon in 1970 concerning the Buckley matter?

A I do.

Q How did you come to attend that meeting?

A That was after I had returned from vacation on August 31, 1970 and sometime shortly after that I was asked, I think by Mr. Miles, it may have been Mr. Silverman, if I would contact Mr. Jordon, who had been my partner and who was then employed at another brokerage house and if I would ask him to attend a meeting at Newburger, Loeb & Company.

And whoever it was that made the request of me also requested that I be present at the meeting because they felt that my presence would make Mr. Jordon more at ease and more willing to talk openly.

Q Now, what was your status in the firm at that time?

A Well, I was still a partner, albeit I had given notice of withdrawal which was to be effective a couple of weeks hence. I had no functions in the firm. I had no functions in the firm from the time I had resigned as managing partner August 11th and gone on vacation a couple of days later.

Q Now, how long had you known Mr. Miles?

A I knew Mr. Miles as of whenever he came to work for Newburger, Loeb which I think was approximately December of 1969.

Q Did you have any prior acquaintance with Mr. Miles?

A No, I had not even been responsible for the interviewing and selection of Mr. Miles.

Q Since your leaving Newb urger, Loeb & Company, on how many occasions have you seen Mr. Miles?

A Excluding his appearances in this courtroom, once.

Q Now, when was the first time you ever heard that the Buckleys had a churning claim?

A I was probably informed of it either immediately upon my coming back from that vacation on August 31st, 1970, whenever it was that either Mr. Miles or Mr. Silverman asked that I contact Mr. Jordon and invite him to a meeting, and it is possible that I was told of it in the day that intervened between I guess Mr. Silverman's receipt of the answer on August 13th and my going on vacation on August 14th.

I tend to not believe that it was in that day but it might have been.

Q Now, during the time that you were present at Mr. Jordon's interview, was anything said about the possibility of a claimover against Gross & Company?

A During the meeting nothing was said whatsoever about the possibility of a claimover.

Q Now, who left the meeting first, if you remember?

A I can't really tell you who left the meeting first but I can say that there came a time that I was the only one left in the office. I think Mr. Silverman, Mr. Miles left at the same time Mr. Jordon did, although they left together and Mr. Jordon by himself. Perhaps even at that time I left to go home because Mr. Jordon would have come down in the natural course of events after the close of the market or after 3:30 in the afternoon.

Q Now, were you aware of the event when the Buckley file was turned over by Golenbock & Barell to Mr. Berkowitz?

A Not until sometime long after it happened.

Q Now, was there ever a time before the institution of this present litigation on the Buckley claim when Mr. Larry Berkowitz asked you for any information about the Buckley situation?

A I never spoke nor met -- I never spoke with nor met Mr. Berkowitz until I saw him in this courtroom in this litigation when it was in process.

Q Was there ever a time before the Buckley matter was settled -- by the way, do you know when the Buckley matter was settled by Mr. Persky?

A I had been told it was on December 30, 1970 .

Q Was there ever a time prior to December 30, 1970, when Mr. Persky asked you for any information about the Buckley matter?

A There was not.

Q Was there ever a time when anybody in the Finley

Kumble firm asked you for any information about the Buckley matter?

A No, sir.

Q Was there ever a time after the turnover of that file when any of your partners or former partners at Newburger, Loeb asked you for any information about the Buckley matter?

A No, sir.

Q Not a single partner?

A Not a single solitary soul on this earth.

Q No employees?

A No one.

MR. GRUTMAN: The former question exhausted the latter one.

THE COURT: All right.

Q Did anybody consult you from the Finley, Kumble firm about the proposed Buckley settlement before it was made?

A No, sir.

Q Did anybody at Newburger, Loeb consult you about the proposed Buckley settlement before it was made?

A No, sir.

Q Did any of your partners or former partners consult you about the Buckley settlement before it was made?

A No, sir.

Q Mr. Gross, do you know what churning is?

A I think I know what churning is in the sense that it is referred to in the conduct of customer accounts in Wall Street.

Q Now, you have told us about the Newburger, Loeb compliance practices.

Did Gross & Company also have some practices in connection with compliance during the period it was clearing through Newburger, Loeb?

A We did.

Q What were your practices?

A Well, we had the same sheets and forms that Newburger, Loeb had for the purposes of listing every transaction, and there was an extension on those forms, the same as Newburger, Loeb in which the commission on the transaction was figured, and these forms were filled out by each of the persons in Gross & Company who dealt with the public at the close of every day and handed to either Miss Bleich or one of our secretaries for the computation of commission, the checking of the commission that was there.

But they also served as a record of every transaction that had been initiated by Gross & Company on that day. And I made it a practice to review these sheets every day that I was in the office. I, of course, since I spent sometime on the floor of the New York Stock Exchange, a chance I didn't get to the office at most for a day or two, I would look back to see what had transpired.

In effect it was a log of the business and a non-totaled log of the income of Gross & Company, and I reviewed those constantly.

Q Now --

A I might add that when I did perceive something that disturbed me I would generally ask whoever the representative on the account was what it was. Usually not disturbed me but something that interested me would be a better way to phrase it.

Q Or raised a question?

A Yes. I might want to know if nothing more than why he was interested in such and such a thing, apparently recommending it to customers, et cetera.

Q In connection with the Buckley account, did you ever see anything which concerned you?

A No, sir.

Q Were you familiar with the volume of the account?

A I was. I was familiar with the volume of the account. I was generally familiar with the positions in the account.

Q And in your opinion what is the appropriate limit, if any, of activity in an account like Buckleys' account ?

MR. GRUTMAN: Your Honor, I think marginal qualifition indicating the admissibility of this witness is still not in the record. Although he said he knows what churning is and has been a managing partner --

THE COURT: Yes. I am a little concerned about that. We will recess, ladies and gentlemen, until 10:00 in the morning.

(Jury leaves the courtroom)

THE COURT: On this record I do not see that there is a foundation for that opinion.

MR. MANDEL: I may try to lay it, I may try to leave it.

Your Honor, let me just say this about the proffer of judicial notice:

If you will look at Wigmore or any other book of evidence rather than these rules, I believe that all public facts and records are those of which the Court can and must take judicial notice, and I think that a very quick --

MR. GLATZER: The fact of the decision but not the underlying facts of the lawsuit.

MR. MANDEL: You get to the question of how do you prove that World War II occurred and who won it and whether this happened or that happened.

Public sources, newspapers, public reference books, including judicial decisions --

THE COURT: What is it you want to prove about Westec? Westec is only in this case to the extent that it is there to show control in one aspect and then to show that Newburger, Loeb did or did not do certain things with regard to it.

MR. MANDEL: All that I wanted to show with regard to Westec, your Honor, and you may consider this overnight on the question of relevancy besides an admissibility, is that it was a swindle within the company and hundreds and hundreds of brokerage houses got caught.

I do this only to negative the idea that this is some private matter of Mr. Jordon's or Mr. Gross' or anybody like that.

THE COURT: Don't you think the record already supports that?

MR. MANDEL: I don't know that the jury knows that.

MR. SHAW: The record does, your Honor.

MR. GRUTMAN: You have the great debacle of the century, the scandle of Wall Street. It is all there, your Honor.

THE COURT: If you want to make that argument, I think the record is replete with it.

MR. MANDEL: If I can make that argument then I don't need these decisions. If I am permitted to state that it has one of the big scandles of the year and the principals went to jail, and so forth, then I don't need that.

MR. GRUTMAN: You said it already.

THE COURT: I think that argument is permissible on the record as it stands. Any contradiction about that?

MR. GRUTMAN: None at all, your Honor.

MR. MANDEL: May I suggest you still have a look at the question of judicial notice because I am going to offer some government publications and a magazine article tomorrow to show that there was a lot of back office trouble in Wall Street and houses were tumbling like dominoes at that period and that this is in connection with claims that Charles Gross was responsible for the fact that the snow fell and the lightening struck.

MR. SHAW: Where do you draw the line? Are we then permitted to introduce in evidence testimony from all the other former partners of all the other former firms that went out of business to the effect that they all got nothing?

THE COURT: No. He is talking about Wall Street conditions.

MR. MANDEL: That is right.

THE COURT: As they existed in '68 and '69.

MR. GRUTMAN: Judge, highways are crowded but that is not an excuse for somebody driving a car carelessly. He is offering it ot exonerage Gross.

THE COURT: Keep in mind that you are talking to the trial judge who sat two weeks on the McDonnel trial about two months ago and I know the truth of what Mr. Mandel is saying, which is that the failure to convert and the enormous spurt in business was the bane of everybody's existence, including firms that managed to survive.

To the extent that Mr. Mandel wants to negative the fact that this was the only house in which this happened and therefore the jury would draw the inference that Mr. Gross is responsible for this happening to the only brokerage firm on Wall Street in which it happened, it seems to me has a point.

MR. GLATZER: I think the issue is the belief of certain people as to the responsibility, is it not?

MR. MANDEL: No.

THE COURT: There is a claim here that he is responsible.

MR. SHAW: There is a claim in the record that other houses went down in the same period. It is in the record.

MR. GRUTMAN: Tomorrow you scheduled a charging conference at the end of the day. I have been going over Mr. Mandel's charges. When you go over his as well as ours, I think we may have to have one more charging conference.

THE COURT: It may be preferable to have it later in the week.

MR. MANDEL: I think it is premature.

MR. GRUTMAN: We had a very full weekend on the assumption we had to get it in.

THE COURT: My law clerks worked all weekend, I worked five hours on Sunday.

MR. GRUTMAN: We are all at it then.

THE COURT: I think we might need a little more time before we do that so we can make an assessment.

MR. GRUTMAN: There are some other charges which we are not able to put in until we hear the remainder of the proof, but these are not the principal substantive charges. They relate to peripheral issues.

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Newburger Loeb & Company, Inc.

v.

Charles Gross, et al.

71 Civ 685

and

Newburger Loeb & Company, et al.

July 15, 1975
10:00 a.m.

(Trial resumed)

(In open court, jury not present)

THE COURT: A couple of things.

Mr. Mandel, on the proposal of the transcript before Referee Babbitt, I gleaned from this that it is clearly arguable that what Newburger Loeb was doing was procedurally trying to get the entire case before the referee and therefore to that end they were willing to give up the churning claim.

MR.MANDEL: Not only the churning claim but all their other counterclaims.

MR. SHAW: Correct.

MR.MANDEL: And if they could only get themselves severed and hear the claim against them alone in the bankruptcy court.

MR. SHAW: And conceivably get a discharge in bankruptcy. That's the other part.

THE COURT: Given that framework in which this language was used, I deem it inappropriate to admit it on this trial. So I decline to do so.

MR. MANDEL: May I place this statement on the record, your Honor? If they have good claims, that is an important asset of the bankrupt and a jury may at least infer from the willingness of the bankrupt to give up all of these claims, which are important assets, if good, for nothing but a procedural advantage, that in fact the bankrupt and its attorneys regard the claims as weak.

THE COURT: That is a troublesome aspect of what you present to me, and I see merit to your position. I fear, however, that on balance this would be contrary to generally accepted principles having to do with settlement negotiations, efforts to negotiate to a position.

I agree with you, I think it does reflect upon that but it is the same type of thing as if a man said "I'll settle a $100,000 case with you for $10,000.

MR.MANDEL: Let me say this. The cases make a very sharp distinction between settlement proposals and other statements made in another context. This was not done by consent with me. In fact, what happened before Judge Babbitt is that I said, "I'll not consent. I don't want them to give up these claims."

THE COURT: Then he withdrew that proposal?

MR. MANDEL: No. The judge refused. He did not withdraw. He prevailed upon Judge Babbit to say, "I am not going to sever and stay the claim against you, no matter what."

MR. SHAW: And then I withdrew.

THE COURT: Let me turn quickly, because I am sure the jury has almost assembled, to two other things.

Would you, Mr. Mandel, for me -- tomorrow is Wednesday -- if you can, in connection with your first -- I left the pleadings upstairs -- it is the first counterclaim and the next one in line, which I think is the third counterclaim --

MR. GRUTMAN: I think it is the fourth, Judge. Is that the motion you are speaking about?

THE COURT: No. This is on the charges.

MR. GRUTMAN: Sorry.

THE COURT: I would like a statement as to what your theory is against each of the various named defendants jg:mg 4

because in trying to get up a charge, I see the group breaking down into two main groups and one possible subsidiary group under your first counterclaim.

If you could, outline for me the rationale behind that. Obviously the general partners you are seeking to hold under 98 of the partnership law and fiduciary relationships and so on.

It is when you get off into the balance of the defendants, the additional defendants and so on, that I have brouble in preparing a charge.

MR. MANDEL: I just want to make certain that we are talking about the same counterclaims.

THE COURT: It is the first two, the first and the second, it would be. The first one asks for accounting and damages for breach of the partnership law.

MR.MANDEL: Would your Honor take a look (handing)?

THE COURT: Yes. It is the second defense and first counterclaim. It must be the second counterclaim. It is. It is the second counterclaim.

In other words, outline for me, if you will, and you may block them if the defendants are similarly situated.

Also I discovered last night something that I find anomalous and obviously has to be corrected somehow.

Judge Ward ruled that certain counterclaims were not compulsory counterclaims and therefore were only available as a setoff to the churning claim.

MR. GRUTMAN: That is correct.

THE COURT: Following that ruling, the plainiff who had asserted a churning claim comes in with $900,000 of claims. This is subsequent. Judge Ward's ruling and reargument is November of 1973, and in December of 1973 along comes plaintiff and adds $900,000 of claims.

Now, it seems either those setoffs have got to be allowed as setoffs against those additional $900,000 of claims or those claims can only be asserted as setoffs against some prior recovery of the defendants in this case, or some alternative that has not occurred to me. But there is an obvious unfairness that has worked here by reason of the timing of this matter and there's got to be some correction, even if necessary to reargue Judge Ward's decision on whether they are setoffs and to what extent they are set off.

MR. SHAW: The way it had been left, your Honor, I had filed an amended complaint in which I included clearing agreements as the basis for the cause of action and indicated to the Court that I wished to amend my ad damnum clause to include the various things referred to in my requests to charge, which do get up to about $900,000,if not more, in damages, basically the deficit caused to Newburger Loeb in this particular count as well as the lost profit in the Buckley account itself.

Now, it is my initial reaction that if Mr. Mandel makes an application to increase his setoffs so that they apply against these charges or claims as well as the other claims, in fairness I could see no objection to that.

THE COURT: That may be the solution. I'll leave that to your thought.

I do want to keep in mind this, though: that I believe the record bears me out, but I have a distinct memory of granting your application to apply for a churning recovery under the theory that it was a violation of the clearing agreement and that I struck the paragraph having to do with the additional damages.

MR. SHAW: Your Honor did. But I also believe that at that point I said, "Couldyou keep this open until the end of the trial so that I could include or try to persuade the Court to increase my ad damnum clause, making the argument --

Get the jury.

(Jury present)

THE COURT: Good morning, ladies and gentlemen.

CHARLES GROSS, resumed:

THE CLERK: Mr. Gross, you remain sworn.

MR. SHAW: Your Honor, In this lull I might introduce Mr. Alex Aixala, who has just arrived. He is sitting in the back of the court.

THE COURT: Very good. Thank you very much.

MR. SHAW: Often known as Angel; arrived from Florida.

DIRECT EXAMINATION (continued)

BY MR. MANDEL:

Q Mr. Gross, yesterday you said thatit was your opinion then and that it is your opinion now that if Newburger Loeb and Company had been liquidated, the general creditors and the subordinated lenders and you, as a withdrawn partner, and other withdrawn partners, and the limited partners, all would have been paid in full.

Is that correct?

A Yes.

Q Now, in reaching your present opinion, in addition to the matters which you mentioned yesterday, did you also consider the Peat Marwick statement of the partnership affairs as of December 31, 1970, which is in evidence as Finley Kumble Exhibit I?

A I used that as the takeoff point for my present opinion.

Q And would you please state the basis for your opinion?

THE COURT: This is present opinion.

Q Would you like the exhibit?

MR. GLATZER: Wouldn't the witness' present opinion be irrelevant?

THE COURT: No. I'll permit it.

A The Peat Marwick balance sheet as of December 31, 1970 indicates total assets of $3,699,000. To that I add $1,540,000, $1,542,000, I believe, that the partners owed to the partnership.

Q The deficit partners?

A The deficit partners, that they owed to the partnership and which I believe they received in tax refunds. That leaves a figure something in the neighborhood of $5,200,000 some odd. From that amount --

Q That $5 million is assets?

A Assets, total assets available for distribution.

From that amount I subtracted $946,000, which

THE COURT: I am always prepared to hear you argue that question further. But I know that when I granted it I had in mind only that you would be asserting the same basic claim, only through another pipe, that you did not increase the amount of the claim by reason of the additional legal rationale for its recovery.

MR. SHAW: That's what you said, your Honor. But I certainly didn't waive any right to argue that I felt that I was entitled to at least ask the Court to increase the ad damnum clause to cover all damages.

THE COURT: All right.

MR. MANDEL: One moment, . please. With regard to what your Honor has been talking about on these setoffs and so forth, your Honor may recall that I made an application that you consider Judge Ward's ruling that certain of our claims are available only as setoffs.

I believe that Judge Ward was in error about that and then, and circumstances have changed now, and under the authorities cited by my friends, you are empowered and perhaps required tohave a fresh look at it.

It is also my understanding that all the counterclaims on counterclaims were only pleaded and denominated as setoffs and as nothing more.

THE COURT: I'll look at that again.

were general liabilities of the firm, and I further subtracted $1,100,000, which were the equities in the accounts of subordinated claims of general creditors; that means the subordinated lenders' accounts.

From thattotal -- I have not got a workout of the precise numbers-- I subtracted the approximately $7,000 owed to Louis Bracker, as a withdrawn partner before I withdrew from the firm; the $130,000, approximately, standing in my name on the balance sheet of the firm; approximately $147,000 standing as positive capital to the name of Adolphus Roggenburg, who resigned from thepartnership in December, before the end of the year, 1970.

I then further subtracted the amount equal to the limited partners' capital, and that number -

Q That is how much?

A I have a schedule of it. That number was $2,166,000.

Those subtractions then left a balance of about $745,000 for distribution to general partners before taking into account the positive values of some assets that were not reflected in the books, most notably the in-kind securities.

Q Will you explain what that means?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A Those were securities which had been--warrants actually, which had been received by the partnership in 1969 concurrent with their doing underwritings, or selling stock to the public, for various corporations. Such warrants are generally received for a very nominal sum, say ten thousand warrants will cost $100,000, and they generally entitle the holder, in this instance, Newburger Loeb and its partners to, in the exercise of the warrants, to turn them in for the stock of the company at a specific price.

That price is generally related to the issuing price of the securities.

Of course, if at some future date the market price of the stocks is higher, when those warrants are surrendered for stock, there is a large profit inherent to them. It is possible in some instances that the market price might be lower or otherwise, but these warrants were valuable properties.

And I added the values of the warrants and other such securities which Newburger Loeb's share of, deducting my own share of the warrants, was well in excess of $400,000, leaving a number of something like

$1,150,000 or $1,200,000 available for, again, lease liabilities, settlement of lease liability, any contract, any diminution of assets by virtue of liquidation, and I believe it wouldhave still left a positive balance in the account of general partners even after they were subtracted.

Another of my considerations, besides the balance sheet, was the fact that I stated yesterday that Newburger Loeb was a nonclearing firm, and it is my understanding that they only had five persons working in the back office at the time they went out of business.

Q Would that be the 11th?

A This is some time in January. I have no reason to believe it significantly changed. And most of Newburger Loeb's personnel was personnel that produced income and it was probably commission,plus, of course, whatever complement of secretaries they needed.

MR. SHAW: Your Honor, I would like to move to strike the testimony with respect to the warrants. What started out as a technical description of something in the testimony incorporated all sorts of testimony as to what may or may not have been hearsay. There is no specification with respect to factual dates.

It is not an explanation or a theory. It is testimonial. In that respect I think we should have testimony and not just a general conclusion.

THE COURT: It is a description of what warrants are.

MR. SHAW: I have no objection to that. But I think it went beyond that to indicate he feels he has a claim in relation to these sums.

THE COURT: He said that before he started.

I'll overrule the objection.

Go ahead, Mr. Mandel.

Q When you were referring to the warrants owned by the partnership and given no reflection on the books, do you have any specific warrants in mind?

MR. SHAW: Objection.

THE COURT: What is the basis for that?

MR. SHAW: It is a state of mind, your Honor. What we are getting is a --

THE COURT: It is either he has certain pieces of paper with names on them or he doesn't.

Am I correct? A warrant is a piece of paper?

MR. SHAW: Correct.

THE COURT: It has a name on it?

MR. SHAW: And I believe we should have testimony and that piece of paper should be introduced into evidence and there should be some foundation for it rather than just his belief that he is entitled to it.

THE COURT: You may cross-examine him on that. Overruled.

Q What warrants were you referring to?

A I was referring specifically to the warrants of Geon, Inc., Computer Software Services, a name later changed to National CSS, and Host Enterprises.

Q When were these warrants you have described acquired by Newburger Loeb & Company?

MR. SHAW: He testified 1969, your Honor.

A Geon and Host were acquired in, I think, approximately May of 1969. Computer Software Services in January 1970.

Q I show you Exhibit JJJJ for identification, specifically page 2 thereof, Item 1, and ask you if you know what that is.

A I do.

Q What is that?

A These are the minutes of the executive committee of Newburger Loeb & Company , August 11, 1970. Item 1 under the heading "New Business" on page 2--

MR. SHAW: Objection unless it is offered.

MR.MANDEL: I offer it in evidence. I offer in evidence JJJJ.

THE COURT: Show it to the other side.

MR. MANDEL: But I'm not offering -- well, I'll offer the entire minute.

MR. GLATZER: I have an objection on behalf of Mr. Muh, who is not a partner in that firm.

MR. SHAW: I object, subject to connection, your Honor. But I do not dispute the authenticity of this document.

MR. MANDEL: Your Honor, the relevant paragraph is this (indicating).

Your Honor will remember there is a claim that Mr. Gross' in-kind securities were converted, not paid over.

THE COURT: It will be admitted. And as to those not present, subject to connection.

xx (Defendant's Exhibit JJJJ for identification was received in evidence)

MR. GRUTMAN: But not as against those not present.

THE COURT: It is offered as a statement of fact as to what the executive committee did with regard to these warrants. It is being offered as evidence of the executive committee's determination with regard to the warrants.

That's the purpose of the offer.

BY MR.MANDEL:

Q I show you Exhibit YYY for identification, Mr. Gross, and ask you if you know what that is.

A I do.

Q What is that?

A This is a memorandum to the partners of Newburger Loeb & Company, signed by Mr. Robert L.Stern, in which he deletes from his previous memorandum --

Q Did you receive a copy of this?

MR. SHAW: Doesn't the memorandum speak for itself?

A I did not.

Q You did not receive a copy?

A I did not. I first saw this at a deposition.

MR. SHAW: Your Honor, with respect to YYY, I have no objection on the basis of authenticity. However, I object on the ground of lack of connection with respect to the other defendants.

THE COURT: YYYY?

MR. MANDEL: No. It is YYY, because it was marked some time ago, your Honor.

I might make that clearer by showing you a document already in evidence.

THE COURT: No. I'll overrule the objection.

MR. GRUTMAN: It would appear that the determinations of the treatment to be made of these securities occurred at the time before Finley Kumble was ever consulted by Newburger Loeb.

I take it it is not being admitted as against us.

THE COURT: It is being admitted as proof of the fact of the treatment that it received at the time, period.

MR. GRUTMAN: I fail to comprehend how that would have any bearing on any relationship whatever to the case if it precedes our involvement or our connection with the client.

THE COURT: I'm admitting it as proof of what occurred at the time.

MR. GRUTMAN: Very well.

xx (Defendant's Exhibit YYY for identification was received in evidence)

MR.MANDEL: At this time, with the Court's permission, I am going to read into evidence to the jury some of these documents.

I am going to read certain documents in the order in which they occurred. The first I am reading from

MR.MANDEL: I now read the first page of XXX, which is dated December 3,1970, on Newburger Loeb & Company stationery, with the address 1900 Avenue of the Stars, Los Angeles, California. And this letter is dated December 30, 1970, and signed by Fred Kayne, with a carbon copy to Robert Persky.

As I said, it is dated December 30, 1970. It is addressed to Paul Risher.

(Mr. Mandel read to the jury from Defendant's

(Exhibit XXX in evidence)

BY MR. MANDEL:

Q Now, Mr. Gross, have you ever signed any document or made any waiver or transfer of your rights in the Geon warrants and the National Computer Software warrants which were referred to in JJJJ and XXX and YYY?

A I have not.

Q How many shares of the Geon warrants of the firm were vested in you pursuant to JJJJ and the August 24 letter, the second page of XXX?

A 1,650.

Q And how was that amount computed?

A I was a 16-1/2% of the partnership that received those warrants. I was a 16-1/2% partner in the partnership that received those warrants.

Q And therefore you compute --

A Therefore 1,650 is 16-1/2% of the 10,000 warrants that were received.

Q Were those warrants ever turned over to you?

A They were not.

MR. MANDEL: Will you stipulate that those warrants were turned over, purportedly pursuant to the transfer agreement, to the corporation Newburger Loeb & Company, Inc.?

MR. SHAW: Just one moment.

(Pause)

MR. SHAW: So stipulated in behalf of the corporation, your Honor.

THE COURT: Very good.

Q Have you prepared a list of the price of the Geon stock at various times?

A I have.

Q Will you produce that, please?

A Yes. (Handing)

MR. MANDEL: I mark this for identification as Defendant's Exhibit KKKK.

xx (Defendant's Exhibit KKKK marked for identification)

Q Will you explain what you have shown on KKKK for identification?

A It is entitled a Schedule of Prices of Geon Stock by Month. I start with the month of January 1971 through the month of December 1973.

Q And do you show the price of the stock?

A The high price of the stock and the low price of the stock during each of those 36 months.

Q And where did you get that information?

A That information was received from Standard & Poors' manuals.

Q And what else have you put on Exhibit KKKK?

A I have put handwritten computations as to what my interest in my share of the warrants, the 1650 warrants that I felt belonged to me, would have been worth if the warrants were exercised for stock and sold at their highest price, which was March 1942.

MR. SHAW: 1942?

Q 1972.

A March 1972.

Q Have you put on the exhibit the exercise price, the cost necessary to exercise the warrants?

A Well, the actual exercise price was $6.84 a share at that time. But for convenience in multiplication I used $6.87-1/2, which is 6-7/8 or a price higher than the actual price.

Q Thus diminishing the actual profit?

A Yes.

Q You have computed the per share profit?

A That is correct.

Q As of one day and multiplied it by the total number of shares --

A By 1650.

Q -- to give a total indicated profit to you on exercise and sale of your Geon warrants of --

A $58,368.75.

MR. SHAW: As of what date?

MR. MANDEL: As of March 1972.

I offer it in evidence.

(Pause)

THE COURT: Mr. Mandel, Mr. Gross would like to supplement his last answer.

Q All right, Mr. Gross.

A I would like to state that one of the calculations I made-- well, not involvedin this calculation, left out of this calculation, is the fact that Newburger Loeb & Company, Inc. received the sum of $60,000 from Loeb Rhoades & Company for their rights in the underwriting of future Geon stock issues.

MR. MANDEL: Your Honor, may the reocrd show that KKKK has been admitted in evidence?

THE COURT: It may.

xx (Defendant's Exhibit KKKK for identification was received in evidence)

MR. MANDEL: May I show it to the jury?

MR. SHAW: Is my objection noted to KKKK?

THE COURT: I thought at the bench your objection had been noted a number of times.

MR. SHAW: OK. Thank you.

MR. MANDEL: May I just show this to the jury?

BY MR. MANDEL:

Q Mr. Gross, I show you LLLL for identification and ask if you have made a similar calculation with regard to your warrants of Computer Software Systems, Inc.?

A I have. This one is entitled "Schedule of Prices of National CSS Stock by Month," which was the name adopted by Computer Software Systems, Inc. at some later date.

Q Have we established the number of shares which you were vested in National CSS?

A We have not.

Q Will you please state the number of shares and how you established that?

A Newburger Loeb & Company, as a result of the consequences of the underwriting, received 18,750 warrants of National CSS. My 16-1/2% share of that 18,750 came to 3,094 shares.

Q And is that the number you have used on LLLL in computing your profit?

A It is.

Q Will you please state your computation of the profit you would have made on those shares?

MR. SHAW: Same objection previously made, your Honor.

THE COURT: Let me ask you this.

Up at the side bar when I asked if it was your position that these warrants had no market value as of February of 1971, you said the answer was yes. I am correct about that, am I not?

MR. SHAW: Your Honor, I am arguing law at that point.

THE COURT: I know. You are not arguing law when I ask you for an acknowledgment of the fact. I asked you -- I put two facts to you and it was agreed that not only were those two facts correct but that a third fact was correct.

Mr. Grutman argued there was a third fact.

That is the other bit of testimony in this case on this issue.

MR. MANDEL: It is a little more than that.

xxx (Defendant's Exhibit LLLL for identification was received in evidence)

BY MR. MANDEL:

Q Mr. Gross, were the warrants of Geon and Computer Software Systems, Inc.owned by the firm of Newburger Loeb marketable?

A They were not.

Q Why not?

A Those warrants were nontransferable.

Q For what reason?

A Because-- and that was recognized, in fact, in Mr. Stern's memorandum, that they could not be transferred or, shall we say, broken up into their component pieces, and that was the purpose of the memorandum, instead of doing that, and they were nontransferable warrants for whatever the reason is that such warrants are never transferable.

Q Did it have something to do with the acquisition--

MR. SHAW: Objection.

THE COURT: Overruled.

Q Did the marketability have something to do with the acquisition agreement?

A Newburger Loeb could not have given me my warrants at that time. They could not have separated them from the other warrants. They were nontransferable.

Q They could not be sold publicly, is that what you are saying?

A They certainly could not be sold publicly.

MR. SHAW: Objection. The witness is being led, in my opinion.

THE COURT: Not in any misleading way, in my judgment.

Q Were the warrants registered for sale on February 11th, registered with the SEC?

A They were not.

Q And were there restrictive covenants with the corporations that issued the warrants?

MR. SHAW: I object, your Honor.

THE COURT: Overruled.

A I don't believe the National CSS warrants could have even been exercised.

MR. GRUTMAN: There was an objection.

THE COURT: Yes. I overruled it.

Q Will you state--

A For one, I don't believe that the National CSS warrants, or Computer Software, whichever it was called at that date, could even have been exercised at that point.

Q Until what date?

A I don't know for sure. It generally runs something between a year and 14 months after the date that they were issued and the issue probably took place in the latter part of January of 1970 or perhaps in February of 1970.

Q The notification to you of your ownership was a notification of beneficial ownership, so title was kept in the corporation, is that right?

A That is my understanding and how I accepted it.

MR MANDEL: May I now show LLLL to the jury, your Honor?

THE COURT: Yes. I am going to permit that.

MR. MANDEL: Will you gentlemen stipulate that in fact the corporation got all of those warrants and ultimately exercised them and sold them and made a profit?

I mean,the ones shown on LLLL, the National CSS.

MR. GRUTMAN: Tell us when.

MR. SHAW: We have already stipulated that these warrants were assigned to the corporation, transferred to the corporation. We did htat a few minutes ago.

With respect to the rest, I would like to bring out testimony, your Honor, on that, and not be asked to stipulate. So I do not stipulate.

THE COURT: All right. I'll await hearing testimony from the corporation on that score as you have stated.

Q Mr. Gross, do you have copies of documents which show the sales of these warrants by the corporation?

A There are copies in your file at the desk, part of which I gave you and part of which Mr. Rothman has.

(Pause)

MR.MANDEL: I won't spend more time on this. One way or another this will come out,either from them or from us.

Q Mr. Gross, in December of 1970, was Mr. Risher a partner of Newburger Loeb & Company?

A He was not.

Q Was Mr. Kayne?

A I believe he had withdrawn previously.

Q Was Mr. Persky, who got a carbon copy of Mr. Kayne's letter to Mr. Risher, a partner of Newburger Loeb & Company?

MR. GRUTMAN: Objection.

A He was not.

MR. SHAW: May I read a portion of this to the jury, your Honor, and may I remind the jury that this is one of the documents that Mr. Fitzgerald--

THE COURT: No. You may just read a portion of the exhibit to the jury.

(Mr. Shaw read to the jury from Plaintiff's Exhibit 57 in evidence)

Q Now, Mr.Gross, does this refresh your recollection that in or about April 17, 1969 or thereabouts -- withdrawn.

Are you aware that during the period Newburger Loeb was attempting to obtain reimbursement from introducing firms, such as Gross & Company, for deficits by virtue of the suspension of trading or any matter involving Westec?

A To my knowledge Newburger Loeb never attempted to seek any reimbursement from Gross & Company. To my knowledge, Newburger Loeb never attempted on its part to seek any reimbursement from any other clearing firm. And to my knowledge, Newburger Loeb at any time that I was a partner of that firm never approached any firm, former introducing firm or current introducing firm, if it had any, for reimbursement pursuant to the Westec debacle.

and then Leo Stern next most so were the dominant partners, but to my knowledge they had no such function as managing partner.

Q They were not called managing partners, but weren't they in reality, as most dominant partners, what you could call managing partners?

A No, I couldn't, and it was always represented to me very definitely that they ran the firm basically on a function of committee decisions, just as when I was managing partner, the executive committee set policy and I did my best to carry them out.

Q Isn't it in fact true when you became the managing partner you were the most dominant of the partners?

A The word "dominant" -- I've run across it before --

Q You have testified so before, haven't you?

A Yes. Mr. Kayne and Mr. Sloane had me in an arbitration.

Q You testified that you were in effect the most dominant partner?

A That was a word that I used in that testimony to characterize the fact that -- I don't know how to address it.

Q You made most of the decisions?

A No, no. That I gave the most impetus.

Q All right. The most impetus?

A To decisions, et cetera; brought things to the attention of the partnership.

Q And got things done?

A It was my function to try to have them done.

Q What else did you understand your duties as managing partner were?

A When I became managing partner, I understood my duties to be inherent in the development of the firm. My specific duties and expertise was always in the generation of income for the firm.

Q Anything else?

A Well, my other duty was to see that each partner of the firm, member of the executive committee, performed his function and that-- well, that he perform his function.

MR. MANDEL: Your Honor, I have been resting very quietly through this, but is any of this relevant?

MR. SHAW: Yes. It is coming to it.

THE COURT: I'll overrule the objection now.

MR. SHAW: There are a series of counterclaims, your Honor, that this is all related to, and I would like it to be understood that I may inquire into it now or at some point regarding our counterclaims.

MR. MANDEL: If we are going into the counterclaims now, I withdraw my objection.

THE COURT: I will permit that.

Go ahead.

BY MR. SHAW:

Q As managing partner of Newburger Loeb, were you required to certify to the information contained in the special operations questionnaire filed by Newburger Loeb?

A I'm not sure whether as managing partner I was required to certify. I might have been.

Q But you did that, did you not?

A I know that I signed along with Robert Stern, who was operations partner, some of the operations questionnaires, yes, sir.

Q And do you recognize 59, 60 and 61 as some of these questionnaires?

May I approach the witness, your Honor?

THE COURT: You may.

A I recognize my signature. I recognize the form of questionnaire. I can't recognize what was in them or testify to what was in them because they were not my function nor my familiarity.

MR. GRUTMAN: I object to that, your Honor. He signed them.

THE COURT: Overruled.

Q Mr. Gross, isn't it in fact true that the questionnaires-- withdrawn.

MR. SHAW: Your Honor, I offer these documents in evidence.

MR. GRUTMAN: No objection.

MR. MANDEL: In connection with which counterclaim?

MR. SHAW: I submit that they are relevant. I don't think that there is any question regarding relevance.

MR. MANDEL: In connection with which claim? Can you tell me?

(Pause)

MR. MANDEL: I object.

MR. SHAW: I submit that they are relevant, your Honor.

THE COURT: On what ground are they relevant?

MR. SHAW: I think they are relevant on the ground of credibility and they are also relevant, your Honor, with respect to the count that involves that fine of $50,000.

THE COURT: Which count is this now?

MR. SHAW: I don't know the exact number.

MR. GRUTMAN: No. 5.

THE COURT: Is that your cause of action or somebody else's?

MR. SHAW: My cause of action.

MR. GRUTMAN: His.

MR. SHAW: I think it is also relevant on the issue of damages in the general circumstances of the case.

THE COURT: At this point, I'll permit it.

xx (Plaintiff's Exhibits 59, 60 and 61 for identification were received in evidence)

BY MR. SHAW:

Q Mr. Gross, directing your attention to 59, does that bear your signature?

A That is my signature.

Q And is that a document which you executed on or about June 27, 1969?

A No.

Q When did you execute it?

A Probably about 14 to 21 days later.

Q And directing your attention to paragraph 9, does that relate to the number of differences between the securities in the active box, securities in the physical possession of Newburger Loeb, and the date the last record was made?

A Item 9 does relate to difference as they existed on June 27, 1969, as submitted to me, and to Mr. Robert Stern, who was in charge of operations and who directed the submission of this document and we both signed. They relate to the number of differences as of June 27, 1969.

Q In other words, the differences between the number of securities you could physically count and touch and the number of securities the records showed you should have had?

A I know that to be what it means now. I don't even know that I knew it to be what it meant at that date.

Q And was that statement false?

A To my knowledge, Mr. Shaw, that was a true statement handed to me by a partner of mine, Mr. Robert L. Stern, who was partner in charge of operations, under whose overall supervision these reports were generated, probably by an employee in charge of our back office at that time, a Mr. Richard Marshall. I accepted these representations on their face value at that time. I believed them to be true, and I have absolutely no apology for signing this statement.

Q At the present time do you know this statement to be false?

A No, I don't know what the state of the record was as of June 27, 1969 at the present time, no, sir.

Q Do you know that the facts set forth therein, as of today, your knowledge today, is false?

MR. MANDEL: He has already answered that question.

MR. SHAW: No, he has not.

A I'll repeat my answer, because I did. On -- this purports to be a statement of the records on June 27, 1969. There has never been any verification of this statement to my knowledge that proves it either true or false.

Q Mr. Gross, wasn't Newburger Loeb censured and fined $50,000 on or about July 23, 1971 because of the falsity contained in the document before you?

MR.MANDEL: I object to that.

THE COURT: Overruled.

A It is not a fact as you state it.

Q What was Newburger Loeb fined for on July 23, 1971?

A Newburger Loeb, the partnership, was fined $25,000 for their lack of proper bookkeeping and records, extending from early 1968 through mid-1969, and Newburger Loeb was further fined $25,000 for an apparent misstatement of fact to the New York Stock Exchange.

Q In those documents before you, correct?

A This may have been what they referred to. But it certainly was -

(Pause)

Q Go ahead.

A This may have been one of the documents it was referring to. I am not aware of mention of it. But to my knowledge and to my ability, these were true documents at that time. It was the information given to me, sir.

Q 60 and 61 in evidence, might these also be documents containing false statements involved in the censure and fine?

A Mr. Shaw, these documents, which are for July and August of that same year, probably fall in the same context. But I want to tell you that Newburger Loeb in the person of Mr. Robert Stern wrote a letter to the New York Stock Exchange --

Q Please --

THE COURT: No.

MR. SHAW: I move to strike everything after "I want you to know."

A These were not false, to my knowledge.

Q Did you sign them?

A Did I sign them? Yes, sir.

MR. SHAW: It is a few minutes after one and I am about to go into another point.

THE COURT: Very good.

We will recess until five minutes past two.

(Luncheon recess)

And I say that this line of questioning, which will open the door to Mr. Mandel on some redirect about the results of that arbitration involving Kayne and Sloane would be incredibly prejudicial to our client and contrary to the whole spirit --

MR. MANDEL: I don't recall any agreement that I'm not going to use --

THE COURT: Gentlemen, why don't you on the plaintiffs' and third-party defendants' side here have a conference as to what you are going to do?

MR. SHAW: Isn't the judgment in evidence?

MR. SILFEN: Absolutely not.

THE COURT: Off the record.

(Discussion off the record)

(In open court)

MR. GRUTMAN: That has been resolved, your Honor, between counsel.

BY MR. SHAW:

Q Now, Mr. Gross, after you became a general partner Newburger, Loe [illegible]an you tell the Court and jury what you did, what your business functions were prior to the time you became managing partner?

A Unfortunately, I really had no business function. My expected function was to be involved in the generation of income for the firm; front office, production of money through underwriting, the getting of new registered representatives to joing the firm, and various things of that nature.

But we were on restriction from the New York Stock Exchange, which prevented that, and those restrictions continued until the last week of June 1969.

So in that time I had a desk shoved into the office with Mr. Robert Stern, and I sort of sat there and mostly listened.

Q Did there come a time when you became more active in the business?

A When I became managing partner.

Q All right. Now, after becoming managing partner, did you take steps in an effort to solve any problems that the business had or to help the business?

A Did I take steps to solve any problems?

Q Yes.

A Oh, very much steps.

Q Can you recall what your first decision was?

A Well, these weren't really my unilateral decisions Mr. Shaw. We terminated the employment of Mr. Richard Marshall, who was in charge of the back office, and the conversion of Newburger, Loeb from a manual to a computer or automatic operation.

We terminated the retention of Peat, Marwich, Mitchell's brokerage consultant team, who had worked with Newburger, Loeb probably from a period in the mid-1968 or fro the time they started their conversion to automatic, and I think that was the first act of a definitive nature that was done after I became managing partner; and I remember that we had quite a discussion about it.

Q Was that during the summer of 1969?

A Yes, sir, it was, probably in August.

Q Can you recall any other steps thatwere takne during the summer of 1969?

A Yes. A firm by the name of John Nuveen & Company had gone out of business. They had coincidentally been tenants in the top floor of our building, and they had a very strong research department that was thinking of going as a team, and I remember that myself, Mr. Settel, Mr. Robert Newburger, sat with some of the representatives of that research team, most notably a Mr. Robert Stoval.

Q Was he hired?

A No. He couldn't hold his team together, and we never did reach any accommocation.

We were going to take them as a full research package, because, as you remember, at this time we were released from the restrictions and permitted to go forward.

Q At that point, can you recall anything else that was done?

A Yes, there was -- concern was being expressed over the continuing volume of customer complaints to Newburger, Loeb, which had started to become quite heavy a year or so previous, and pursuant -- the conversion to automatic was completed at about that time, and pursuant to the -- you showed me the memo of the New York Stock Exchange in April 1969 -- we undertook to take the first general count, physical count of security positions since August of 1968, which was an abnormally long time between such counts.

Q When did you begin taking that first physical count?

A I think it was the week end of September 6th or 7th.

Q Who took the counts?

A Newburger, Loeb & Company, with its personnel under the direction of Robert Stern and Robert Therese. And there may have been some temporary help in the actual counting from some Peat, Marwick auditing personnel; I'm not certain.

Q What did you discover?

A Well, we discovered that there were significant numbers of securities differences, both long and short, existing at Newburger, Loeb at that tome.

Q How significant?

A Well, the number was probably only half again -- not half again -- half as much as the number of what I was informed by my operations partner they had in something called plug accounts, in other words, positions that they were not sure of, but I think they were in the neighborhood of two or three thousand differences. I think the securities plug accounts represented somethihg like 5,000.

Q Did it take a number of days for the physical count to take place?

A It was done over a weekend, Mr. Shaw.

Q And you say this was done on the 5th or 6th?

A 5th, 6th, 7th, whatever that weekend was, in 1969.

Q Can you recall if prior to that time there had been a report prepared by the New York Stock Exchange?

A (No response)

MR. SHAW: Withdrawn.

Q Can you recall if in fact the sequence was that the New York Stock Exchange came, made an examination, found certain things, and then Newburger, Loeb had

Mr. Therese and various persons make a count?

A I cannot recall that because that was not the fact. The fact is that New York Stock Exchange came concurrent with the taking of the count, perhaps a day before or after, but long after it had been planned and set up, and they came to do an audit of the July -- the end of July, if memory serves me, I think July 20th operations questionnaire, which they didn't receive until the end of August.

The facts as you stated them are not true, so I cannot recall them.

Q I show you this document, 62 for identification, and ask you if you recognize this as a report of the New York Stock Exchange of their examination of the books and records of Newburger, Loeb as of September 4, 1969.

A I have never seen it before.

Q Does that document, to your knowledge, relate to Newburger, Loeb?

A It says it does.

Q Can you tell from looking at the document that it relates to the company?

MR. MANDEL: I object to that.

THE COURT: Sustained.

MR. SHAW: I offer this document in evidence, your Honor. It has already been authenticated by Mr.

Fitzgerald.

THE COURT: Let me see it.

(Pause)

THE WITNESS: I have never seen this before.

THE COURT: This, I take it, is an internal memorandum of the stock exchange.

MR. SHAW: Yes.

THE COURT: At this point I will sustain the objection to it.

Mr. Gross has never seen this.

BY MR. SHAW:

Q I show you this document marked 63 for identification and ask you if this is a copy of a letter that you received on or about September 15, 1969 from the New Yrok Stock Exchange.

A It is.

MR. SHAW: I offer that document in evidence.

THE COURT: Would you show it to Mr. Mandel, Mr. Shaw.

(Pause)

MR. MANDEL: No objection.

THE COURT: It will be received.

* * * (Plaintiff's Exhibit 63 was received in evidence.)

MR. MANDEL: What's the date of that, please?

MR. SHAW: September 15, 1969.

May I read it, your HOnor? This is the same thing as 64. I marked the same document twice.

(Mr. Shaw read to the jury from Plaintiff's Exhibit 63 in evidence.)

BY MR. SHAW:

Q Mr. Gross, what if anything did you do after receiving this letter dated September 15, 1969, in an attempt to solve the problems or help the business or as managing partner of Newburger, Loeb?

A Well, we did a lot of things.

Q The question is, what did you do, sir? Can you answer that?

A I personally?

Q Yes.

A I recommended that our accountants be directed to give us a schedule of accounts so that the firm could have a better grasp on its profit and loss situation -- no, I would say the first thing that I did was to respond to the letter on September 23, 1969; I'm sorry.

Q You wrote a reply.

A Oh, yes, sir.

Q Is your reply what I previously marked as

Exhibit 66 for identification?

(Handing)

A That's correct, sir.

MR. SHAW: I offer this in evidence.

I have shown this previously to Mr. Mandel.

MR. MANDEL: What is the date of this?

MR. SHAW: September 23, 1969.

THE COURT: Mr. Shaw, that exposure was several weeks ago, and he may not know exactly which is which, so it's preferable if you do it each time here, please.

(Pause)

MR. MANDEL: No objection.

THE COURT: Received.

* * * (Plaintiff's Exhibit 66 for identification received in evidence.)

MR. SHAW: May I, your Honor, just read one portion of the document.

This is a letter to Robert N. Bishop at the New York Stock Exchange. I am reading from page 3, and it is over the signature of Charles H. Gross, Managing Partner; at page 3, paragraph 4, the last paragraph.

(Mr. Shaw read to the jury from Plaintiff's Exhibit 66 in evidence.)

(Mr. Shaw read to the jury paragraph 5 of the enclosure of Plaintiffs' Exhibit 66 in evidence.)

BY MR. SHAW:

Q Mr. Gross, is it correct that as of September 1969, to be moreprecise, as of on or about September 23, 1969, the recordsof Newburger, Loeb failed to indicate or showed a discrepancy with respect to $13,000,000 worth of stocks on the long side and $10,000,000 worth of stocks on the short side?

A As of that date?

Q Yes.

A That's correct. It showed a profit for Newburger, Loeb of approximately $3,000,000.

Q A profit?

A Yes.

Q I'm sorry. Did Newburger, Loeb have a profit during 1969, sir?

A As of that date those differences of $13,000,000 on the long side and $10,000,000 on the short side would be a profit situation for Newburger, Loeb of approximately $3,000,000; and further, as the records indicate, that on research those numbers were halved and quartered within a matter of days and weeks thereafter.

Q Doesn't that assume that the longs are related to the shorts? Isn't it possible thatthere was a loss of $13,000,000 in the long condition and $10,000,000 in the short account so that there wouldbe a net loss of $23,000,000?

A No, sir.

Q In fact, when the records were finally put together, isn't it a fact that a loss of almost $2.3 million was established?

Q I said that previously. The loss of $2.3 millio eventuated from the back office mess that existed for two years.

Q But is it your testimony --

A And we cleaned it up, Mr. Shaw.

Q As a result of the discrepancy in the long and the short account that your letter of September 23rd shows a $3 million profit?

A Well, my understanding, and I have never been a back office expert, Mr. Shaw, is that a long difference means that you have securities for which you have no home, no customer position.

You might have securities that perhaps don't even belong to you, I don't know. And a short position means that the customers are credited with securities that you don't have.

If the long securities were to be liquidated and the short securities bought, my mathematical analysis, and I'm not a back office person, means that a net inflow of $3,000,000 would have come to the firm.

Q Mr. Gross, as a result of these figures, as a result of this imbalance, isn't it in fact true that there wasn't a profit, there was a substantial loss?

A Mr. Shaw, you asked me about that moment in time. I only wished that that had been a continuing situation.

Much later, the situation was different. As the longs were researched and the shorts -- the shorts then became in ascendancy over the long. And that is where the loss was taken. Not as a result of longs being overshot.

Q As of this point in time, September 23, 1969, is it your testimony that there was a profit of $3,000,000 to Newburger, Loeb?

A As of that point in time, according to what I understand now, it would be my testimony that if those longs and shorts were liquidated at the market, Newburger, Loeb would have $3,000,000 more than it started with.

MR. SHAW: I move to strike as unresponsive.

THE COURT: No, I will permit it to stand.

Mr. Shaw, this isn't really taking us along the path, though.

MR. SHWW: I will pass it.

BY MR. SHAW:

Q Just one point: If there are more stocks in your possession than your records show you should possess --

A There are security positions, yes.

Q Don't those excess stocks escheat the State of New York as opposed to becoming your property?

A I really don't know that, Mr. Shaw. I only know what would have been the situation at that time; if they had been liquidated there would have been more money at Newburger, Loeb.

Q If you sold the stock not knowing who the owner was because your records didn't show it, could you keep the money?

A I don't know. It was certainly done all over th street. That is how some firms made money and some lost it at that time.

Q I will go on to another point --

A I don't really know.

THE COURT: Mr. Gross, all right. Let's go on to another subject.

Q Were efforts made commencing in or about this period of time by you to interest people in becoming investors of capital in Newburger, Loeb?

A I don't believe I made any personal efforts at that time, Mr. Shaw. And I know that we didn't.-- I don't know -- I'm reasonably certain that we didn't take in any capital in that period of time.

Q Didn't people become subordinated lenders after September 23, 1969?

A I don't recall anything in the numbers that you suggested.

Q Any numbers? Did anybody --

A At that time I remember, I think one person became a subordinated lender for some small amount. I'm not sure that it was then or later or before that.

Q How about limited partners? How about general partners?

A I don't think we took in any limited partners nor general partners at that time.

Q After that time?

A Oh, subsequent to that we took in some general partners.

Q How about limited partners?

A I don't believe so.

Q Did the general partners include Mr. Kayne and Mr. Sloane?

A Yes.

Q How about Mr. Bracker?

A Mr. Bracker become a partner at the same time that Mr. Kayne did. I think they signed the partnership agreement at the same time in California.

Q Did you have any conversations with Mr. Bracker?

A Commencing in the fall of 1969, probably towards the latter part of the fall of 1969, yes.

Q Were your conversations with Mr. Bracker or with Mr. Kayne or Mr. Sloane and your activities in California calculated or intended on your part to benefit the business of Newburger, Loeb?

A Of course.

Q In California was an office opened?

A We opened an office in Century City, California, a satellite office, before that in Mr. Bracker's office. We first opened towards the end of January 1970, and the Century City office I think was occupied in March and officially opened the 1st or 2nd of April, 1970.

Q Was this done on your recommendation, your suggestion?

A You mean myself personally?

Q Yes.

A The entire firm had a hand in these decisions.

Q Including you?

A I said the entire firm, Mr. Shaw. I was a member of the firm.

Q Did you make any recommendation? Did you take any position regarding this?

A I was in favor of it. So were all the other partners.

Q In 1969, September of 1969, did Newburger, Loeb also at your suggestion sign a lease at One New York Plaza?

A No.

Q When was that lease signed?

A My best recollection is that it was probably the latter part of December 1969. I don't have a copy of it, but I know your suggestion is not true.

Q It was the fall, late fall --

A I would consider that the winter.

Q By virtue of this lease, did Newburger, Loeb expand its expenses and increase the number of square feet of space that it had for offices?

A Oh, yes, we anticipated that would be the result that we would expand our expenses and increase the number of -- no one gives office space for nothing.

Q How many additional square feet did you add to your office space?

A I think approximately 19,000 or 20,000 feet.

Q 19,000?

A Something like that.

Q Had the main office of Newburger, Loeb previously been at 5 Hanover Square?

A Yes.

Q How many square feet did it have there, in December of 1969?

A I really don't know. Specifically, I think the main offices of Newburger, Loeb probably doubled the amount of one floor. There were two floors, there were the eighth and ninth floors.

Q In December of 1969 was Newburger, Loeb under restrictions?

A In December?

Q Yes.

A Yes.

Q Did the New York Stock Exchange in or about this period commence some sort of disiplinary procedure again Newburger, Loeb involving or in any way related to the special operating questionnaires which were signed during the summer of 1969?

A Mr. Shaw, in the first place, I don't know that the New York Stock Exchange ever instituted any proceedings involving the special operating -- operations questionnaires, as you put it. And in the second place, I don't recall or have no knowledge of any such proceedings being commenced at the time frame that you mentioned.

Q I show you 67 for identification and ask you if this is a special operating questionnaire which you filed with the New York Stock Exchange.

A By me, you mean the firm of Newburger, Loeb & Company?

Q No, you personally. Is your signature on it?

(Handing)

A This is an operations questionnaire as of September 26, 1969, signed by myself and Mr. Robert Stern as in charge of operations, and as with the other operations questionnaire, I relied upon the information given to me by my partners.

Q Is that one true?

A I at the time believed to the best of my knowledge and with all of my heart that it was true, and I probably still believe that it's true. I can't read it and tell.

Q You say that you sent a letter to the New York Stock Exchange dated September 23rd, which is in evidence. I show you what has been marked 68 for identification and ask you if this is a copy of your reply to that letter.

MR. SHAW: I should note, your Honor, there is something annexed to it, but this was annexed to it as received.

Q I direct your attention to the entire thing.

(Pause)

A Yes, this is the letter that modified and lifted to a large extent some of the restrictions the stock exchange had imposed upon us 15 days earlier.

Q Does this letter have annexed thereto a copy of testimony which you gave to the New York Stock Exchange?

A I' have to look at that. I only looked at the letter.

(Pause)

MR. MANDEL: May I come up and take a look at this? It will save me a minute or two.

THE COURT: You may.

(Pause)

MR. SHAW: Mr. Mandel, I am going to offer 69, 70, 71, 72 and 73. Perhaps you can look at it.

MR. MANDEL: Are you offering that?

MR. SHAW: And that is being offered.

MR. MANDEL: With regard to that document, your Honor, the thing that is annexed I believe is not contemporaneous and was not received by Mr. Gross at the same time as the letter.

THE COURT: Let's find out what he says.

THE WITNESS: Yes.

BY MR. SHAW:

Q Have you finished reading it?

A I have.

Q What is annexed, is that an extract of testimony that you gave before the New York Stock Exchange?

A It's an extract of testimony I gave to the New York Stock Exchange in May 13, 1971, I believe, was the precise date.

MR. SHAW: I offer this entire thing in evidence, your Honor.

MR. MANDEL: Your Honor, I don't think it is one document.

THE COURT: It can't be.

MR. SHAW: I received it like that. If you want to separate it, I'd be more than glad to do so, your Honor.

MR. MANDEL: You have a letter of 1969 with some testimony in 1971, and --

MR. SHAW: I will be more than glad to separate them, your Honor.

(Pause)

MR. SHAW: Shall I make this 68 and 69A?

* * * (Plaintiff's Exhibit 68A marked for identification.)

* (Plaintiff's Exhibit 68 for identification was received in evidence.)

MR. SHAW: I offer 68A.

MR. MANDEL: Mr. Gross said that is the testimony.

THE COURT: In 1971.

THE WITNESS: I recognize it.

MR. MANDEL: No objection.

THE COURT: It will be received.

* * (Plaintiff's Exhibit 68A was received in evidence.)

MR. SHAW: I offer the remaining documents which I showed Mr. Mandel.

MR. MANDEL: 69 there is no objection.

* * * (Plaintiff's Exhibit 69 for identification was received in evidence.)

MR. MANDEL: 70 you will have to qualify.

71 there is no objection to.

72 there is no objection.

73 you will have to qualify.

* * (Plaintiff's Exhibits 71 and 72 for identificatio received in evidence.)

BY MR. GROSS:

Q Mr. Gross, did there come a time when restriction were removed from Newburger, Loeb?

A Restrictions were first modified in the New York Exchange letter of October 1, 1969 in response to my letter of September 23rd. They were then further modified on or about January 7th, I think, or 8th, 1970, and they were removed in all regards on or about January 23rd or 24th of 1970.

Q Did you know the firm of Simonson, Peyser & Citrin, an accounting firm?

A Oh, yes.

Q And Mr. Berkowitz, you had known him for an a number of years, too, hadn't you?

A At that time?

Q Yes.

A No.

Q Didn't you retain Simonoff, Peyser & Citrin directed.

THE COURT: Go ahead.

BY MR. SHAW:

Q Did Newburger, Loeb make or lose money for the year 1969?

A Newburger, Loeb lost money in 1969.

Q How much?

A The figure that Newburger, Loeb lost, according to our tax return, the partnership tax return, was approximately a million, three, and I think in the latter part of January of 1969 -- I know in the latter part of January 1969 I reported to the executive committee that preliminary estimates given to me were that Newburger, Loeb had sustained a loss of $1,230,000.

I think that was a meeting of January 24, 1969.

Q Is it '69?

A January 24, 1970, I'm sorry.

MR. MANDEL: Just to make sure there is no misunderstanding, the Berkowitz you are talking about is not the Larry Berkowitz who is an additional defendant here --

MR. SHAW: No, the Berkowitz, the accountant of Simonoff, Peyser & Citrin, the accounts.

MR. GRUTMAN: The first witness who was called here.

Q Thereafter did Newburger, Loeb receive a warning suspension from the New York Stock Exchange?

A I don't know that to my own personal knowledge. I was not a partner when the event think you are referring to occurred.

Q I show you this letter dated March 24, 1970, and ask you if you received it from Mr. Fitzgerald.

A No, Mr. Shaw, Newburger, Loeb did not receive any warnings of suspension by virtue of this letter.

Q Did you receive this letter?

A I think I did.

MR. SHAW: I offer 77 for identification into evidence.

MR. MANDEL: I can't see any relevance to any of the issues in this case. I don't see any.

THE COURT: I will allow it. Overruled.

xxx (Plaintiff's Exhibit 77 received in evidence.)

MR. SHAW: May I read this, your Honor?

THE COURT: You may.

(Mr. Shaw read to the jury from Plaintiff's Exhibit 77 in evidence.)

Q I show you 78 for identification and ask you if you recognize this as a copy of the executive committee minutes of

March 26, 1970.

A Oh, yes.

MR. SHAW: I offer this in evidence.

THE COURT: Received.

MR. MANDEL: No objection.

THE COURT: Received.

xxx (Plaintiff's Exhibit 78 received in evidence.)

MR. SHAW: I'd like to read one portion, your Honor.

(Mr. Shaw read to the jury from Plaintiff's Exhibit 78 in evidence, ending with "carefully rationed distribution."

Q Mr. Gross, do you recall that on March 26, 1970, you received a letter from the New York Stock Exchange, Mr. Fitzgerald's letter of March 24th, and also discussed at the executive committee the purchase by Newburger, Loeb of a basketball team?

A Are you asking do I know that we received a letter from the stock exchange concurrent --

Q Yes --

A -- with discussion we had in the executive committee about the preparation of a private placement memorandum for a basketball team that we had previously committed ourselves to?

Q Yes.

A Yes, I do.

Q Did Newburger, Loeb buy a basketball team?

MR. MANDEL: Your Honor, how is this relevant to any of the charges in this case?

THE COURT: Aren't there allegations concerning this basketball team?

MR. SHAW: I believe there are, your Honor.

MR. MANDEL: Which cause of action?

MR. SHAW: May I have the pleadings?

THE COURT: Why don't you find where it is, Mr. Shaw. My copy of the pleadings is upstairs.

(Pause)

MR. SHAW: Your Honor, there is no specific pleading dealing with the basketball team as there is in relation to other things. However, it would seem to me that it would be covered by the general language in paragraph 55 and 56, the ninth defense offset and first counterclaim.

THE COURT: Let me look at that.

MR. SHAW: In addition it's already been in evidence in relation to Stern memorandum. I think it relates to the general financial condition of Newburger, Loeb. There has been testimony about this basketball team.

THE COURT: Where is the place in the pleading that y say it appears?

MR. MANDEL: Would your Honor care to borrow my copy?

MR. SHAW: This is marked, your Honor, but it really says nothing on it (handing).

(Pause).

THE COURT: I think in my discretion I will sustain the objection.

Q Mr. Gross, can you recall that in early 1970 you began to buy and sell certain securities in a trading account which you opened up?

A You mean a trading account that I opened up in 1970?

Q Yes.

A No, I don't recall having opened any trading account in 1970 for the purchase of securities.

Q Didn't you purchase and sell the stock of City Investing commencing in or about January or February of 1970?

A I started to purchase the stock of City Investing in February of 1970.

Q Right.

A But I didn't open the account. The account was opened in late June or early July 1969 when other transactions were made in that account, including the fact at that time of a trade in City Investing along with many other securities.

Q Who did you speak with about the opening of that account?

A In 1969?

Q Yes.

A In June?

Q Yes.

A All of my partners on the executive committee knew about it. Mr. Edwin Rubin knew about it, at that time. I think everybody knew about it at that time.

Q Mr. William Rubin?

A Edmond.

Q Was there a loss in that account?

A In the summer of 1969, I think the account had a net deficit of $12,000.

Q Was there a loss in that account as of the summer of 1970?

A I think the account lost money in 1970 -- I know the account lost money.

Q About $186,000?

A No, about $80,000.

Q $80,000?

A Eight zero, comma, zero, zero, zero, Mr. Shaw.

Q Was there also a loss to your knowledge -- may I inquire as to whether there was a loss in the basketball team, your Honor?

THE COURT: No, I don't think so. I think that is out of this case.

Q I show you this letter dated July 24, 1970, 86 for identification and ask you if this is a copy of a letter received by you from Mr. Bishop.

A Yes.

MR. MANDEL: May I take a look at it, your Honor?

THE COURT: Yes.

MR. SHAW: I offer this in evidence.

MR. MANDEL: No objection.

THE COURT: It will be received.

xxx (Plaintiff's Exhibit 86 received in evidence.)

MR. SHAW: May I read this letter to the jury, your Honor?

THE COURT: You may.

(Mr. Shaw read to the jury from Plaintiff's Exhibit 86 in evidence.)

Q Mr. Gross, on or about August 11th of 1970, was there a meeting of the executive committee of Newburger, Loeb?

A Yes.

Q Was one of the purposes of the meeting to discuss new business, including a notice of the fine to be given to capital contributors?

A I don't recall without seeing the document.

Q Was the fact that there had been this fine and the fact that capital contributors would have to be advised of it discussed at the meeting?

A Without reference to the document, I don't recall.

MR. MANDEL: This is in evidence.

MR. SHAW: I will read it then, your Honor.

(Mr. Shaw read to the jury from Defendant's Exhibit JJJJ in evidence.)

Q Mr. Gross, was the fine of $50,000 a fine that somehow or another related to the special operating questionnaire that had been signed by you during the summer of 1969?

A I really can't accept the way you put it, Mr. Shaw. The fine, as I explained earlier today, was broken into two parts. One for the failure to keep proper books and records for a period extending from 1967 through mid 1969, and the other for what I think was referred to as apparent misstatements to the exchange by the firm. I don't know what misstatements are specifically referred to, I don't know when the misstatements were made, if in the exchange's view the one operations questionnaire, if any that I signed before I became managing partner, I'm not sure whether the June one was signed before or after I became managing partner, if they are included, I can't testify to that. But I know the censure and fine of Newburger, Loeb and Company, the partnership, was for and I do not feel myself involved in any misstatements as you suggest.

Q During the first six months of 1970 had Newburger, Loeb lost money in each month?

A I can't recollect specifically. I know that Newburger, Loeb lost a lot of money at that time for a variety of reasons, most prominent among which was the diminution of business --

Q I don't think there is a question outstanding, sir. One of the documents indicated the sum of $220,000 had been lost, I believe in January and February of 1970, do you recall that?

A Yes.

Q Do you recall if there was a similar loss trend during March, April, May, and June?

A I know that Newburger, Loeb lost money and had lost a considerable amount of money in the first half of that year. I can't specifically recall month by month computations.

Q At or about this time did the various general partners or some of them begin to make statements attributing the difficulties to you?

A I have never heard that, to this day. Excuse me. Except from two parties who were partners of the firm in our California office.

Q And two days or three days after the meeting on

August 11th of the executive committee did you go on vacation?

A I think I have testified that my last day at work that week was probably Friday, August 14th, and I was on vacation for two weeks thereafter.

Q And thereafter did you consult with Mr. Golenbock of Golenbock and Barell?

A I consulted with Mr. Golenbock at the time that I had made up my mind to resign from the partnership, and I felt that Mr. Golenbock, who was counsel to Newburger, Loeb, could properly tell me how to word my letter of resignation. I did consult with him.

Q Did you have a meeting with Mr. Golenbock shortly after August 14, 1970?

A No, I would say I had a meeting with Mr. Golenbock shortly before August 31, 1971, if not on that date.

THE COURT: '70?

THE WITNESS: 1970, I'm sorry.

Q And did you discuss with him at this meeting how to withdraw your capital from Newburger, Loeb?

A Not really. What I discussed with him at that meeting was how to give notice of my withdrawal as a partner and to confirm with him whether or not my interpretation of my rights for the withdrawal of a portion of my capital were in fact consonant with the partnership agreement.

Q So that you discussed withdrawing from the partnership and getting your money out, correct?

A I discussed the mechanics of withdrawing. The decision to withdraw was solely my own and had been made, as I testified yesterday, really quite sometime in advance.

Q You indicated that you attended a meeting at the offices of Finley, Kumble on August 24th of 1970 where there was a prepared statement read. Had you discussed with Mr. Golenboch withdrawing your capital and resigning from Newburger, Loeb prior to August 24th of 1970?

A I had not.

THE COURT: Mr. Shaw, I think we will take a recess at this point. We are going to set, as you know, until 5:30. I am going to break this into two recesses, because I have a brief matter at 4:30. We will take a recess now for ten minutes.

(The jury left the courtroom.)

(Recess)

(In the courtroom in the present of the jury.)

BY MR. SHAW:

MR. SHAW: I'd like to offer 80, 81, 83 and 85 for identification into evidence.

MR. MANDEL: No objection.

THE COURT: Received.

(Plaintiff's Exhibits 80, 81, 83 and 85 were received in evidence.)

xxx

Q Mr. Gross, I believe that you have testified that after attending a meeting at the offices of Finley, Kumble on August 23rd you made a decision to withdraw as a partner of Newburger, Loeb --

A That meeting was held August 24th, Mr. Shaw, and, yes, it was in the following week after reviewing the events of the meeting and my feelings about it, I did make that decision.

Q At that meeting I believe that certain statements had been made regarding you, correct?

A No, that is not correct. Not at all. There was, I believe, only one small reference to me at that meeting. Vario statements were made, as relating all over that document regarding the partnership and the former partners, bu not about me.

Q When was the first time that a statement was made about you?

MR. MANDEL: I object to the form of that.

THE COURT: Sustained. Don't answer.

Q Wasn't there a meeting in July of 1970 where your behavior was in some respect criticized for your inability to control the senior partners?

A I think I testified that Mr. Kayne and Mr. Sloane

Therese, Mr. Frank, and Mr. Settel asked me to meet with them in the latter part or mid July, 1970, and they opined that I had not been firm enough insofar as the senior managemen of the firm were concerned, and they thought that perhaps a new face would do it better than it was agreed that Mr. Kayne would come East as my assistant, to later take on the reins after my vacation, as managing partner, but that when I observe Mr. Kayne's behavior for the first week or so that he was in New York, I determined in the midst of the executive committee of August 11th, in the middle of the meeting I said this charade had no future together, that if Mr. Kayne was to behave in the manner that he did, I would resign at that point, and did, as managing partner.

Q Did there come a time at any of these meetings when anybody made any accusation or claim against you?

A I recognized no accusations or claim against me at those meetings, that I can recall.

Q Did you attend a meeting with Mr. Miles and Mr. Silverman and Mr. Jordan?

A I did.

Q When was that meeting?

A I have been told recently that that meeting was on September 15, 1970.

Q How long was the meeting?

A Between an hour and two hours, perhaps. I really don't know. It is not firm on my part. I had no real part in the meeting.

Q As of that point, September 15, 1970, you were no longer active in the business of Newburger, Loeb, correct?

A That's correct.

Q And you had given notice of withdrawal of your capita

A That's correct.

Q And you were demanding return of your capital as well as the interest on your capital, correct?

A I had not given any such notice of demand at that time. I was still a partner, you see.

Q Had you at that point spoken with Mr. Golenbock with the procedure involved in withdrawing from Newburger, Loeb

A I think I testified before recess I spoke to Mr. Golenbock shortly before, a day or so before August 31st probably either the Friday before that Monday or perhaps even that Monday morning itself.

Q As of that point was it your view that if Newburger, Loeb was liquidated there would be enough money left over to pay the general partners?

A Absolutely.

Q Was it your view as of this point that the subordinat lenders would all be paid their subordinated accounts?

A Well, if the limited partners were to be paid and the subordinated lenders had precedence over them, naturally they would have been paid.

Q Was it your view that everybody would have been pa[illegible]

A I don't know about all of the general partners. I don't know that at that time I knew the status of deficits, et cetera, but I felt that there was sufficient money in the partnership for all capital contributors who had positive capital, to get the major portion of their capital out.

Q Out of the assets of the partnership?

A Out of the assets of the partnership and out of any monies that -- I think some accountants said, in this room, would have to be ponied up by the partners who were in deficit.

Q Was it your view that there was sufficient assets in the partnership as of that date, September 15, 1970, so that the subordinated lenders and limited partners could be paid without the general partners who were in capital deficits putting up any portion of their tax returns?

A I don't have in front of me a balance sheet of Septem 30, 1970, and I don't believe that I had any position at that time that takes into account your restriction, without people who owe money paying their money. Any position I ever had involved the concept that people who owe it will pay it.

Q As of September 15th, did you feel that the possibili existed that you would be involved in a legal dispute with Newburger, Loeb or Mr. Kayne or any of these persons?

A No.

MR. SHAW: No further questions.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q Mr. Gross, do you remember yesterday what you swore to under oath as the word that Bob Persky spoke to you when he sat on the soft cushions of Mr. Golenbock's office on February 8th?

A I think I do.

Q I wrote them down, and yesterday do you remember having testified that Mr. Persky said to you at the conclusion of the meeting, "Well, you know, Charles, we can make it so you'll be sorry you did not do what Fred asked"? Do you remember testifying to that under oath yesterday, Mr. Gross?

A I do, and I think you also properly give the inflectio

Q That wasn't what Bob Persky said, was it, Mr. Gross?

A That is the recollection I have in my mind and have had in my mind since that moment, of what Mr. Persky said.

Q Now, Mr. Gross, when you testified yesterday, were you suggesting that Bob Persky was making a threat to you?

A I am suggesting that I felt threatened by Mr. Persky, and that I believe he intended it as such.

Q And Mr. Persky said to you, "You'll be sorry you did not do what Fred asked." That is what Persky said to you?

A I believe that is the nearest approximation to his precise words that I could give, and that certainly is what he said in meaning.

MR. GRUTMAN: Move to strike what he certainly said in meaning.

Q Were you suggesting, Mr. Gross, that he was making you an offer that you couldn't refuse?

THE COURT: No, sustained.

Q Mr. Gross, you testified at the arbitration about a year or so ago, didn't you?

A Oh, I testified in arbitration that lasted for more than a year, so I testified many times.

Q Very well. I am going to read to you again what you testified to here yesterday and what you testified to concerning the same conversation under oath, at page 1175 of the transcript. Yesterday, that conversation as you testified to it went this way.

"Well, Charlie, we can make it so you'll be sorry you did not do what Fred asked."

And at page 1175 of the transcript you testified some considerable time ago: "Mr. Persky had very little to say at that meeting, but at the end of the meeting, after I had refuse Mr. Persky, in his manner, looked up and said, 'You know, Charli I think time will show it would be in your best interest to do what we are asking you to do.'"

The question was, "Did Mr. Persky make any threats to you at that meeting?" That was your answer. That was on the sixteenth session of that arbitration.

THE COURT: What date, please?

MR. GRUTMAN: I don't know the date, your Honor.

Q Mr. Gross, do you see the difference between what you testified to at the arbitration and the language that you used earlier in a case where Persky wasn't the defendant or his law firm --

THE COURT: I sustain an objection to form from about the fourth word.

Q In the case in the arbitration Mr. Persky and his law firm were not litigants, were they?

A They were not.

Q The date of that testimony is December 19, 1973. What is your recollection, Mr. Gross, as to what took place on February 8, 1971, better in December of 1973 when you swore under oath to the arbitrators than it was yesterday when you gave us your present recollection of what Mr. Persky said to

Q In 1973. Did you find any piece of paper, any document, sir, letter, memorandum, or writing where Bob Persky made a threat to you?

A I think you might say that such a threat was embodied in Mr. Persky's own notes of January 15th meeting with Mr. Risher, Mr. Muh, himself, Mr. Mandel, and myself and his mentioning at that time specifically of the Buckley case and other things. Yes, I think there was a document or a piece of writing. I think it's in evidence in this court.

Q What document are you referring to, Mr. Gross? I don't know which exhibit number.

A I certainly don't know the exhibit number, Mr. Grutman, but I described it to you.

Q While they are searching for it, do you remember Mr. Persky throughout all of his dealings with you and your lawyer, trying to reach a settlement?

MR. MANDEL: Your Honor --

Q Do you remember that?

MR. MANDEL: I object to that, your Honor, because it goes into dealings when Mr. Gross was not present.

THE COURT: Sustained.

Q Did your lawyer report to you on the occasions when you were not present what Mr. Persky was advocating was a settlement and no litigation?

A At one instance he reported to me of a February 5, 1971, meeting which was late in the game when Newburger, Loeb and Company, Inc., were desperately trying to work out accomodations.

Q Late in the game Mr. Persky was still seeking to make peace, you understood that, didn't you?

A No, I understood late in the game that Mr. Persky initiated moves to make peace. That is what I understood.

MR. MANDEL: Mr. Grutman, here is the document I think you are looking for.

MR. GRUTMAN: Those are Mr. Ryan's notes.

MR. MANDEL: No, I think those are Mr. Persky's notes. I'm almost certain they are Mr. Persky's notes.

THE COURT: What exhibit are we talking about?

MR. MANDEL: W, your Honor.

Q Your lawyer has produced for me Exhibit W in evidence which is dated January 15, 1970. Is that the document which you say you looked at that improved your recollection, Mr. Gross? It reads as follows:

"Mandel doesn't want to talk. Orderly. Present plan and liquidation. Wants some cash. Not paper of corporati But personal guarantee. Minimal way to contention" --

MR. MANDEL: No, counterclaims.

MR. GRUTMAN: "Minimal wait to gather claims, five or "ten percent. Gross has to be in business. Other partners especially on" -- something or other -- "men individually. Visit open for Gross and him to call." There is a figure of $300,000 also written down.

Is that the document that you say -- just one moment, sir, and if you can, answer my question yes or no -- is this the document, dated January 15, 1970, which you say you looked at and refreshed your recollection that Robert Persky on behalf of his law firm threatened you?

A I can't answer that question yes or no, Mr. Grutman.

Q Very well --

A That document --

Q That is an answer.

A I didn't say it refreshed my recollection. I said that was a document that represented it in writing. As to your question, I answered your question. That was a document that represented in writing --

Q A threat --

A Memo of threat. Yes, counterclaims, Mr. Grutman.

Q By the way, I was in error, Mr. Gross. The conversation where Robert Persky said which you attributed to him from the soft pillows of Justine Golenbock's couch took place on September 8, 1970, not February 8, 1971.

A I assumed that was the conversation you were talking about.

Q I want to read the language for the last time of what you said in 1973, when you testified, "You know, Charles" --

MR. MANDEL: Your Honor, this has been gone over three or four times.

MR. GRUTMAN: I need it as a predicate.

THE COURT: Overruled.

Q "You know, Charlie, I think time will show it would be in your best interest to do what we are asking you to do."

Did you regard the phrase, "in your best interest," as a threat?

A I regarded the entire statement as a threat, Mr. Grutman. You hear someone say something --

Q That is an answer --

A -- and you know when you are being threatened.

Q That is an answer. While you have been in court, do you recollect the letter which Golenbock and Barell signed on December 31, 1970?

A I can't be certain. I think I know what you mean, but you better show it to me.

Q Sure. I think it's Exhibit 50.

(Pause)

Q I have a copy of it, it's Exhibit 51, previously marked 29FF in which the firm of Golenbock and Barell, speaking

Q Besides the language which Mr. Persky used as you ascribed it to him in the arbitration in 1973, or as you gave it to the Court yesterday, and as the document Exhibit W shows, did Mr. Persky make any other threat to you?

MR. MANDEL: In his presence, you mean?

MR. GRUTMAN: In his presence.

A Up until and including January 15, 1971, when we had the meeting in Mr. Mandel's office, I think I had -- I think that was perhaps the fourth, at most the fourth time that I had seen Mr. Persky. Once was at that executive committee meeting, once I had been introduced to him in passing on the premises of Newburger, Loeb, once I had met him in Mr. Golenbo office --

THE COURT: The question is whether he had made any other threats to you. That is the question.

THE WITNESS: Two out of the four meetings, yes.

Q The first threat was the one that you testified to at the arbitration --

A And here.

Q Here, in this courtroom.

A Yesterday, September 8, 1970.

MR. GRUTMAN: That is the one he's testified to.

Q Where was the second one, I'm sorry? It has eluded me.

A Mr. Mandel's office, I testified to it yesterday, on January 15, 1971.

Q What did he say on January 15, 1971?

A He told me that they had the Buckley case in which I was involved --

Q Exactly --

A And he told me that they had other claims against me and that if he didn't go along I would be tied up in court and I would find it difficult to operate in Wall Street. I said that yesterday, I am pleased to repeat it today.

Q Mr. Gross, when Mr. Persky told you that, did you not understand that he was speaking on behalf of his client or clients?

A I understood that Mr. Persky was speaking to me.

Q Yes.

A He was along with Mr. Risher and Mr. Muh at that time. I understand that he reported it --

MR. GRUTMAN: Your Honor, I have asked a question --

A I understand that Mr. Persky was speaking to me and he was threatening me. He didn't tell me --

Q On whose behalf?

A I don't know.

THE COURT: That is what he said.

Q Did Mr. Persky say that he had a personal grievance ments, disorganization, lack of financial control, losses sustained, the Lou Bracker affair, that he was talking about you?

A He was talking about the partnership, Mr. Grutman. He made that perfectly clear in words edited for him by Mr. Bamberger and Mr. Persky.

Q You didn't deny -- may have to strike the latter part of that. There is no such evidence.

THE COURT: Strike it out.

Q Who brought Lou Bracker to the partnership?

A I recommended that Lou Bracker, a deal be worked with Mr. Bracker and that he be made a partner. It was discussed at executive committee meetings, and he became a partner of the firm pursuant to the same restated articles of partnership that Mr. Kayne and Mr. Sloane became partners. And Mr. Kayne and Mr. Sloane operated from his office in California.

Q Mr. Gross, without appearing immodest, from the time you became a general partner -- rather, the managing partner, you acknowledge, do you not, that you had the most influential vote in the executive committee?

A I don't think so. I think I had the most influential voice. I think all votes are one to one.

Q But the force of your personality, you were the most dominant one, weren't you?

A I like to think that the logic of my reasoning did it, not the force of my personality.

Q It wasn't the force of your personality rather than the placidity of the other partners that carried in the executive committee?

A Newburger, Loeb was in the mess it was in when I became managing partner because they weren't doing anything, yes, I generated action to make sure it was cleaned up.

Q And you were the driving force, were you not? You were the leader?

A I was -- without question I was the leader.

Q And you were the one that initiated bringing Bracker to the firm, weren't you?

A Oh, yes.

Q Fine. And what happened to Bracker? He went to jail, didn't he?

MR. MANDEL: I object.

THE COURT: Yes, what's the basis for this question? Come to the side bar, please.

MR. GRUTMAN: I will do it in open court.

THE COURT: No, I want to hear it at the side bar.

(At the side bar)

THE COURT: How do you propose to tie his going to jail in with this man as a basis for making that question in th weren't you?

A I am required to remember a lot of things. Some things you don't remember all the time, Mr. Grutman.

Q So your testimony --

MR. MANDEL: One moment, please. I am going to object now on the ground that the only relevance of this is to impeach the witness with regard to knowing falsity. The witness has said that he omitted two minor things that happened, what, fifteen years ago.

THE WITNESS: Fifteen and more years before.

THE COURT: I will permit examination. Go ahead, Mr. Grutman.

Q Are you saying, Mr. Gross, that the instances where you were disciplined by the stock exchange were things that you had forgotten in 1971?

A Oh, absolutely.

Q You had?

A Certainly. This was a very common occurrence for floor traders to be questioned about floor activities. I was probably questioned dozens of times as were all my compatri and I didn't remember these two instances. That is absolutely correct.

Q You were censured in 1955, were you not?

A And in 1953.

Q And you were fined in 1953?

A $250.

Q Is that true?

A That's correct.

Q And you had forgotten about that when you filled out this form for the stock exchange in 1971 is what you tell us here today, right?

A Absolutely correct.

Q Tell me, Mr. Gross, were you led off the floor by Bunny Lasker in connection with any of those fines or censures?

MR. MANDEL: Is that relevant, your Honor?

A No, I'd like to answer that.

MR. MANDEL: All right.

A I'd like to answer that.

Q Were you?

A That is --

Q The question is: were you led off the floor by Bunny Lasker?

A At no time in my life, and I'm not sure Mr. Lasker was a member of the New York Stock Exchange in 1953 or 1955, but I have certainly never been led off the floor by anyone.

Q Are you permitted on the floor of the New York Stock Exchange to trade?

A Am I permitted on the floor today?

securities?

A No, sir.

MR. MANDEL: For his own purposes, was his question.

A For any purposes.

Q Were you censured for that?

A No, sir.

Q Were you censured for violating New York Stock Exchange Rule 402?

A No, sir.

Q And Exchange Commission Rule 8C1?

A No, sir.

Q Did you pay $25,000 to the New York Stock Exchange?

A Not for that, Mr. Grutman.

Q For what did you pay it?

A For a rule that is worded as follows, and I take this opportunity with relish to read it to you.

Q 342?

A "It is hereby agreed for the purpose of settling this proceeding only that Gross admits that from April, 1970, through August 11, 1970, Newburger, Loeb and Company, a former member firm, was in violation of Exchange Rule 402, Section 8 of the Securities Exchange Act and Rule 8C-1 promulgated thereunder. And that by virtue of his status as managing partner of the firm during the foresaid period, Gross is deemed to have

"Violated Exchange Rule 342."

Q And a fine was imposed?

A Pardon me?

Q A fine was imposed?

MR. MANDEL: That is irrelevant, your Honor.

A You asked me what I stipulated to as to rule violation and I answered you.

MR. MANDEL: One moment, please --

Q Was a fine imposed?

MR. MANDEL: That is irrelevant. The only thing relevant is the conduct of the witness.

MR. GRUTMAN: If Persky's sentence was relevant, Judge, a $25,000 fine is not spitting on the sidewalk.

THE COURT: That is the difference in the finding of the adjudicative body as far as I can determine here. We are only talking about conduct. I will sustain the objection.

Q Do you concede, Mr. Gross, that as managing partner you had a responsibility for what was done in the firm under your stewardship?

A I said to the exchange, Mr. Grutman, that I had --

Q Can you answer my question?

A I'd like to answer you directly.

Q I will withdraw my question.

Will you admit, Mr. Gross, that as managing partner irrelevant.

THE COURT: Yes, I believe it to be irrelevant.

MR. GRUTMAN: I believe, your Honor, that under the law of the State of New York that in order for Mr. Gross to prevail that has to be the fact.

MR. MANDEL: We don't agree with that.

MR. GRUTMAN: Your Honor will see the cases in our charges.

THE COURT: I don't see that that has to be the exclusive motive of the actors. If that is one of their -- assuming that a conspiracy exists -- if that is one of the things that is done along the way to the injury of others --

MR. GRUTMAN: I think the law is otherwise, your Hono but I shan't argue in front of the jury.

Q Do you believe that there were other purposes to the transfer agreement and the reorganization of Newburger, Loeb other than depriving you, your sister and Miss Bleich of your capital? Just yes or no.

A I believe that there were other purposes, oh, yes.

Q Very good. In connection with the basketball team, Mr. Gross, had you personally guaranteed a loan of $250,000 in your own name?

A That is probably correct. I don't remember the precise amount at the time, but that is probably correct.

Q And were you jointly and severally liable on another loan in connection with the purchase of the basketball team in the amount of $500,000?

A I can't answer you as to numbers, but I know that there were guarantees of loans by myself and my partners.

Q In the amount of $750,000?

A You are telling me the number. I'm not telling you, Mr. Grutman.

MR. MANDEL: Why is this relevant, your Honor? What case are we on now?

MR. GRUTMAN: I don't need this, Judge. Please, will you admonish Mr. Mandel?

THE COURT: I take it this is generally going to motive, et cetera.

MR. GRUTMAN: Absolutely.

THE COURT: Overruled.

Q Mr. Gross, if you had been held personally liable for the $750,000, could you have paid it?

A I thought so at the time.

Q As a result of the efforts of Fred Kayne, one of your alleged co-conspirators, and Robert Muh, the basketball team was sold and you were spared that liability, weren't you?

A As a result of the effort of many persons, myself included.

Q Are you going to testify that the basketball team was sold through your efforts, Mr. Gross, rather than the efforts of Kayne and Muh? Which is it?

A I am making the statement that I made effort to sell the basketball team. The ultimate sale was something that I think came about through the efforts of Mr. Settel and Mr. Muh.

Q Mr. Muh --

A After I had left the firm. If I had still been a member of the firm I'm sure I would have been a participant in the efforts.

Q But you weren't.

A I had left the firm.

Q And you know, Mr. Gross, that you were liable for liabilities incurred by the firm before you were a partner, at that time even after your withdrawal, isn't that so?

A I know of no liability for the basketball team that was incurred by the firm.

Q No, my question to you is: did you know, Mr. Gross --

A As a matter of law, Mr. Grutman?

Q Did you know as a matter of fact --

A No, not as a matter of law.

Q Neither Mr. Golenbock nor Mr. Mandel or any lawyer had ever advised you that you had a personal liability for obligations incurred by the partnership while you were a partner the 20th of December to advise me that I probably needed counsel. Other than that I didn't know what was going on.

Q By the time the first of those meetings began, you were already a partner who had served a notice of intention to withdraw, correct?

A No I was not a partner when the first of the meetings began.

Q I said you served your notice --

A No, I was withdrawn as of September 30, 1970.

Q Perfect. That meant that so far as any voting within the partnership, you had no voice to vote? You understood that, didn't you?

A I'd say I had no voice to vote at any partnership meetings I was not a partner.

Q But while you didn't have a voice to vote in your own name you had a sister and an old family friend and former partner in Miss Bleich, didn't you?

A I don't get the connection.

Q The connection is that blood is thicker than water and you decided to use your sister and your family friend as leverage for your own purposes, didn't you?

A No, sir.

Q You didn't at all?

A No, sir.

Q You mean you are telling us you were not in touch with your sister trying to persuade your sister to withhold her consent unless the people involved in the reorganization accommodated themselves to whatever your demands were?

A I told my sister that I thought it was a lousy, unfair deal, that the deal was a rip-off, that the deal was particularly unfair to me, and that I was not going along with it, and I didn't think it would serve her to go along with it, and that it would be unwise of her to go along with it.

Q When you said it was unwise of her, were you threatening her?

A I have never threatened my sister except as an eight-year old kid, and I only presume that.

Q When you told your sister that it was a lousy deal, a rip-off, did you tell her that before her own lawyer had recommended as in her best interests?

A I don't know when her own lawyer recommended it.

Q December 31st.

A No, I didn't tell her that before her own lawyer recommended it. I told her that after her own lawyer recommende it, because that was my opinion. I didn't need someone else's.

Q Your sister knew nothing about this business up here, did she? She didn't attend any of the meetings between November and February?

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A My sister is a resident of Melbourne, Australia.

Q And your sister is your sister. You knew that, didn't you?

A I have been told that.

Q And, therefore, your sister is going to rely on you?

A On the context that my sister and I agree on many things and disagree on many things, yes, she might, but my sister is a very strong-willed person, she doesn't rely on me as often as you might think.

Q And when Mr. Mandel said at that meeting that blood is thicker than water, wasn't he saying on your behalf that your sister was going to do whatever you wanted her to do?

A Ask Mr. Mandel that. I'm not the proper person to answer.

Q I may.

How about Miss Bleich, she wasn't in Melbourne. She lived up on the Grand Concourse. Were you in touch with Miss Bleich?

A On occasion.

Q When these negotiations were going on?

A I was probably in touch with her specifically in the period in the very latter part of January and early February. But not often.

MR. MANDEL: Excuse me, your Honor. Is this relevant?

MR. GRUTMAN: Yes.

THE COURT: I will permit it.

Q And wouldn't it be fair to say that you were aware that Miss Bleich had signed a number of extensions of her capital to the stock exchange? You knew that, didn't you?

A I think --

Q Did you know that?

A I was aware that Miss Bleich had signed an extension on her capital which was just a gesture on November 19th. I was not aware of anything else.

MR. GRUTMAN: Move to strike what was "just."

Q Did you know that she also signed the draft agreement in her own hand on December 31, 1970?

A I'm not sure that I know or knew who signed it at that time. I have learned about it since.

Q Or that her lawyer had signed on her behalf?

A I don't know. I have heard a lot since. I don't know that I knew at that time.

Q Did you know that she had signed a power of attorney for the lawyer to sign the final agreement on February 11th, and that she executed it on February 10th?

A I learned that during the course of this litigation in this courtroom.

Q Did you learn anything from Mr. Silverman during this period of time?

A I had very limited contact with Mr. Silverman.

Q You saw Mr. Silverman for an hour and a half on December 10, 1970, according to Mr. Silverman's testimony. Do you remember that?

A I don't. I don't question it, but I had very limite contact with him.

Q Mr. Silverman I am talking about is the man who was your lawyer, who is your lawyer now.

A Mr. Silverman is not my lawyer now. Mr. Mandel and the firm of Golenbock and Barell are my lawyers now.

Q But Silverman is a partner in the firm of Golenbock and Barrel who are the lawyers continuing to represent you today in these litigations?

A That's correct.

Q In connection with Newburger, Loeb?

A Yes, with leases that Newburger, Loeb has defaulted on.

MR. GRUTMAN: Move to strike that.

THE COURT: Strike it out.

Q Wouldn't it be fair to say in effect the promoters of the new corporation were trying to convince Miss Bleich that it was in her best interests to go along with the deal, as had all the other general partners and all the other subordinated lenders and all the other limited partners? You knew that, didn't you?

A The word "convinced" bothers me because it was report to me that they were harassing her.

MR. GRUTMAN: Move to strike that.

THE COURT: No, leave it in.

Q Did you know that they were trying to persuade her or talk with her and did you know that Mr. Silverman had refused to permit her personal contact with any of the principal of the new corporation?

A I know that -- I have been told that Miss Bleich left her employ at Newburger, Loeb on February 1st and did not return because she felt harassed and felt uncomfortable in those premises.

Q Where did she go to work when she left Newburger, Loeb?

A Miss Bleich went to work with me at Heine and Company.

Q Who got her the job?

A I have to presume that Miss Bleich gets jobs on her own merits.

Q Are you saying you had nothing to do with taking Miss Bleich, your old family friend, your father's former secretary and your former partner, along with you to Heine and Company?

A I certainly am -- I am certain that I invited her along but she was paid that salary because of the decision of the partners of Heine and Company. I wasn't a partner.

Q Have you agreed to pay any of the legal fees incurred on behalf of either your sister or Miss Bleich or both, in this case?

A I have agreed that the original retainer that I paid Mr. Mandel and the cost of -- I don't know how you phrase it -- carrying the litigation --

Q Disbursements.

A Disbursements. Thank you. Would be my responsibility in the event we do not prevail. I don't consider it much risk.

MR. GRUTMAN: Move to strike the latter part of the answer, your Honor.

THE COURT: Strike it out.

Q Mr. Gross, wasn't Miss Bleich very much like a shuttle cock between the battle doers of you on the one side and the promoters of the new corporation shortly before the February 1st closing?

A No, sir.

THE COURT: Sustained. The answer may stand.

Q And shortly before the closing, Mr. Gross, did you tell Miss Bleich that in your opinion the deal was a lousy deal, a rip-off and no good and didn't serve your interests?

A I think it was my opinion at that time that the paper she received probably wouldn't be worth very much.

Q Did you tell her that?

A I'm not certain whether or not I did.

Q Did you tell her whatever you did as vigorously as you expressed it to your sister?

A No, Miss Bleich was here in this city, she had her counsel in this city and my sister was far away. Miss Bleich had a much better grasp of her own of the situation.

Q Did you also tell her that if your demands were met and you got paid she should go along with the deal?

A No. By the time we reached those negotiating sessions we negotiated as a group.

Q So there came sometime where there was a triumvirate of you, Bleich, and Donoghue, right? And that was shortly --

A No, I'd like to rephrase that --

Q That, Mr. Gross, was shortly before the closing?

A Mr. Grutman, I'd like to rephrase that.

Q Do you understand my question? Please answer.

A At that time Miss Bleich and Mrs. Donoghue could be best called holdouts. I was also a holdout, and meetings were called, one of which I attended to negotiate with us. And if you get the impression I mean as a group, Miss Bleich was separately represented, as was Mrs. Donoghue, from myself.

in chambers?

MR. MANDEL: It might be better to start a half hour earlier, your Honor.

THE COURT: The problem is, I want to keep the proof going along here because I am distressed with the effect on this jury that was told two to four weeks and is now going to go into six, and I haven't told them yet, but they suspect it.

MR. SHAW: I think there should be a reporter present.

THE COURT: Very good.

MR. SILFEN: I believe on Friday there was an indication that you were going to be concerned about the various motions.

THE COURT: I have been reviewing those and at the appropriate time, I will speak.

MR. MANDEL: You have before you still under consideration Mr. Gross' computation of his earnings as a trader during certain periods.

THE COURT: Let me ask you this: one thing, before I get to that, are you going to be offering more proof on the basis for the position that Newburger, Loeb took with regard to the Rafkind offer, or is that the totality of your proof?

MR. MANDEL: We already have the letters in evidence, your Honor, and the agreement which speaks for itself. And we

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have Mr. Rafkind's testimony, and I think that is the totality of the proof -- no, I think there are some admissions that other people knew what Berkowitz was doing on behalf of the partnership, including Persky.

THE COURT: This is on the Rafkind matter?

MR. MANDEL: Yes, I think that's right.

THE COURT: I am troubled by the law on the Rafkind matter substantively, given the totality of proof that I foresee you have, because there seems to be a substantial body of New York law that unless the proof shows that it was solely from a malicious motive, solely from a malicious motive, the cause of action may not be submitted to the jury.

MR. MANDEL: Your Honor, that in our position, those cases have nothing to do with this one which are also in breach of a fiduciary duty and have nothing to do with this one which are in violation of the antitrust laws. In other words, those cases --

THE COURT: Spell out for me a little more this claim of antitrust violation.

MR. MANDEL: Your Honor, attached to my requests to charge on antitrust, which you may not have had a chance to study yet, is a small brief on the New York law on the subject. And the New York law says that a covenant such as this, which is unreasonably broad, is not legally valid. In its entirety it's out. In addition to that, in this particular case since Gross was going to act only as a trader there could be no apprehension of harm to Newburger, Loeb. Therefore, the anti-competition clause which Newburger, Loeb invoked to --

THE COURT: Yes, I understand what you are saying. What about this motivated solely by malice?

MR. MANDEL: This has nothing to do with antitrust law or breach of fiduciary obligations. I will say without needing to look at the cases that you will find that every one of those cases are cases that do not involve fiduciary obligation or breach of the antitrust law.

THE COURT: Are you going to go beyond proof that would show that Mr. Berikowitz was the actor and he was not authorized by anybody else?

MR. MANDEL: No. Presumably he was authorized by the partnership.

THE COURT: I'm not going to take a presumption. If you are going to have an antitrust case, you have got to I suppose have a combination or conspiracy and there has got to be some affirmative proof of the combination or conspiracy, more than a presumption.

MR. MANDEL: Berkowitz was not only the attorney for the partnership, he was also one of the promoters of the new corporation and we will show that his authority also came

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from Risher, who was another promoter. So that our position is that the promoters of the corporation and Berkowitz and Persky and the partnership itself were all involved in this.

THE COURT: I have not seen any affirmative proof of the involvement of anybody other than Berkowitz and he only to the extent that he calls this to Rafkind's attention. And when they predicate a refusal to hire on it, he says, I don't say that, I say I am telling you about it and if you want to take that position, you better consult your own lawyer. That's all. I don't understand anybody else is going to say, Mr. Berkowitz, you do this, Mr. Berkowitz, we want you to do this.

MR. MANDEL: I think we have the deposition evidence which we will give you if it is not already in.

THE COURT: I will await hearing that. Because unless we get to that, I don't have to reach the question of Mr. Gross' schedule, which I find --

MR. MANDEL: Your Honor, I think it is the other way around. I think I should be allowed to make my record on the presumption that it will stand up as something valid even if only as one step in the conspiracy for which all conspirators are liable.

THE COURT: I don't see you need to get into proof of his training or relevant years if the cause of action is not

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going to stand. The Rafkind matter is already in the record for whatever you can draw out of it.

MR. MANDEL: We think we are entitled to damages for every step in the conspiracy.

THE COURT: That assumes that this is provably part of the conspiracy for the jury to consider. I don't feel necessarily that it is on this stage of the record.

MR. MANDEL: My point is that until your Honor does dismiss that in some way, we should be allowed to make our record as well as we can. What I would like to do --

THE COURT: Mr. Mandel, true. Let's go on with our case and other points. But all I want to say is that if you represent to me, and I credit your reputation, if you represent to me that certain matters are going to come in or not going to come in, then I can act earlier than at the close of the entire case.

MR. MANDEL: Your Honor, I am virtually certain that we have evidence that others knew and approved. If not in Berkowitz's deposition -- I may have to hunt that out, but --

THE COURT: At this point I am seriously troubled by the absence of anybody's involvement other than Berkowitz and I am also seriously troubled by the question that New York State law seems to indicate that the action has got to be motivated by malice alone.

el/lf/114

MR. MANDEL: I ask your Honor to take in mind my distinction that this does not apply in a fiduciary case or an antitrust case or as part of a conspiracy.

THE COURT: That brings the other element back in which we are talking about. All right. You had certain matters.

MR. MANDEL: Let me put it this way: if Your Honor were to assume that we had a good cause of action on Rafkind, would your Honor feel that we are entitled to show the past history of Gross' trading profits as an element on which damage can be computed?

THE COURT: I am leaning that way, put it that way.

MR. MANDEL: In that connection, I'd just like to hand up again what you already have, which is a copy of our request to charge on damages and I'm sure if you will have somebody look at the cases, which are cited.

THE COURT: We have discussed this in chambers. You may keep that already. We already discussed that in chambers. That is the basis of my leaning.

MR. MANDEL: Fine. The next matter I have to bring up with your Honor is the question of judicial notice of public facts, et cetera. And I am talking now about the fact that, not so much Westec, because I don't think that is important, but we will want to hand up government publications showing the

MR. GRUTMAN: It shows his accountability, clearly. And the liability is imposed. But he said there was only one violation. And here you have the chairman at the conclusio stating that it was the finding of the stock exchange that there were compound violations. As the record presently stands, Mr. Gross has presented what I think is only half a face to the jury, that all that was held against him was mismanagement. But that is not what Mr. DeNunzio says in Exhibit 113.

THE COURT: Let me look at the exhibit.

MR. MANDEL: May I be heard on that, your Honor?

THE COURT: Not unless I need to hear you. Bring the jury in, please.

(The jury entered the courtroom.)

CHARLES GROSS, resumed.

CROSS EXAMINATION CONTINUED

BY MR. GRUTMAN:

Q When we recessed yesterday, Mr. Gross, I was at the point of inquiring about your awareness of the fact that the promoters of the new corporation in the course of their negotiations with you and your lawyers had made an offer of settlement to you, do you remember that?

MR. MANDEL: Your Honor, I object to the characterization. It is not an offer of settlement because there was no litigation. It is a question of some terms on which they would come to an agreement. It is a different matter entirely.

THE COURT: Use that characterization.

Q They had offered to compromise or compose the differences which existed between the demands you were making and to which there had been resistance, isn't that a fact?

A The fact is that an offer of compromise was discussed.

Q And it was the promoters, that is to say, the people whom you are suing in this lawsuit, Kayne,Risher, Muh, Berkowit and Persky --

A And Sloane --

Q And Persky as their lawyer who transmitted an offer to compose those differences by making payment to you; that is the fact, isn't it?

A Not the way you characterize it, Mr. Grutman. He didn't transmit an offer. My understanding is that these offers were evolved in bargaining sessions. He didn't come forth with an offer.

Q I understand. What had happened was in the chafferin process in the bickering that went on between the contentions offered by you and the position or counterpositions taken by others there emerged a point in time in which an offer was made to you that included the payment to you of cash?

MR. MANDEL: I object to the word "offer," which is a legal term.

THE COURT: We have defined what it is, Mr. Mandel. Overruled.

Q Isn't that so, sir?

A Mr. Grutman, I can't see Mr. Mandel --

Q I'm sorry. Can you see him now?

A Yes.

Q Can you answer my question?

A There did come a time at which a compromise was worked out or tried to be worked out on the basis of the payment of some cash.

Q Did you know that the resistance to making payment to you of cash was a resistance that originated from the subordinated lenders and the limited partners?

A I only knew at that time that there was resistance. I did not know that at that time, in fact, to use the word "know," I don't know it at this time. It had been my understanding that the person who ultimately rejected the compromise with Mr. Kayne, who was neither a subordinated lender nor a limited partner.

Q Don't you know it was Mr. Kayne who offered to put up the money?

A No, I don't know that.

Q That was never told to you?

Q That was never told to me and I don't know it at this time.

Q Very well. Mr. Gross, after these bargaining sessio had reached the point where a proposal of settlement or compromise had been arrived at, did Mr. Mandel call you and communicate that offer of compromise or settlement to you? Just yes or no, please.

A Mr. Mandel called me on the afternoon of February 5, 1971.

Q And communicated --

A I was at my home.

Q And communicated the offer of settlement to you, didn't he?

A He communicated a -- no, I won't use that phrase. He communicated an offer that was being made by all of the adverse parties, if I may call them that.

Q And, Mr.Gross, when he called you did he also recommend that you accept the proposal?

A No, he presented the proposal to me.

Q Did he say that he did approve of it or did he speak of it favorably?

A He spoke of it in neither way. He said we have reached a certain state, I have been asked to call you to get your ratification of it. He presented it to me.

Q When he called to get your ratification, did he tell you that he had not rejected it on your behalf?

A I can't conceive of him having called me for my ratification if he had rejected it. He wouldn't have called me.

Q For how long did you talk to him?

A Half hour, an hour. Maybe 45 minutes, it's in-betwe

Q In substance, Mr. Gross, was the net result of that telephone conversation your rejection of the proposal because you wanted more money?

A In substance, that is not correct, Mr. Grutman. You started all right, but you ended badly. In substance --

Q That is an answer to my question, Mr. Gross --

A Because no money was offered me at that time.

Q Is it your testimony that the offer that was made to you did not include a proposal that included the payment to you of cash?

MR. MANDEL: On which date?

Q That the date that you called --

A On the afternoon of February 5, 1971, it is my testimony and my recollection that the offer that was offered to me included for the first time --

Q Cash?

A The giving --

Q I'm sorry --

A I'm answering the question.

Q All right, Mr. Gross. Forgive me for interrupting.

A For the first time the giving to me of the same paper that the promoters and others were offering to other general partners, whether withdrawn or not, with positive capital. That is what was offered to me in that conversation, and that is what I rejected offhand.

Q Was there an offer of cash in addition to the paper at that later time?

A There was at the February 8th meeting which I attend an offer of some cash. A minimal amount.

Q I didn't ask you how much for the moment, Mr. Gross. Who was it who offered the cash?

A Well, as I have testified before, there were 20 people there and if you want me to give the name of the persor who either finally said yes when Mr. Mandel was speaking, or who said something and -- I can't tell you who offered it. It evolved from that conversation.

Q Isn't it your recollection, Mr. Gross, that the offer of cash came from the so-called promoters of the new corporation, not from subordinated lenders and not from limited partners?

A No, because you see, they were all there, Mr. Grutma and they all concurred, so the offer didn't come from any one of them. It came from the --

Q Concensus?

A I don't want to use "new team," but the whole group that was anxious to get this thing done.

Q I take it it is not your testimony and you can't deny that the impetus or the suggestion originated with the promoters to pay you cash?

A I have no idea what went on among them and I have no interest.

Q When the cash was offered to you in addition to the paper, putting you on the same plain and giving you parallel treatment with all other partners, general partners and withdrawn partners with positive capital position, you rejected the offer of paper and cash because you, Charles Gross, wanted more, is that true?

A I rejected the offer.

Q Because you wanted more?

A Did you ask me a question?

Q I asked you to answer that question.

A Then let me answer it.

Q Would you answer that question, please. You wanted more, is your question.

A I wanted what I was entitled to. If that was more, it was more. If that was less, it was less. I think it was much more.

Q At the time you were talking about what you were entitled to, had you had the beneift of conferring with your counsel concerning what the partnership agreement entitled you to?

A (No response)

Q Had you?

A I never asked my counsel what it entitled me to. I told my counsel at various stages what I thought it entitled me to. He probably concurred, but you see, the numbers, the only numbers I had the benefit of was the $231,000 standing to my name as of the proposal of December 17th showing November 30, 1970, and it is my understanding that it was on that basis that everyone else's capital was frozen while my capital was being constantly diminished alone. I had the benefit of $231,000. That is what I had the benefit of.

Q May I draw a comparison. There was another man in the partnership as a general partner named Leo Stern. He had about three or four times as much capital positvely in Newburg Loeb as you did at the time we are speaking of, isn't that tru

MR. MANDEL: I object to this as irrelevant and essentially a misstatement of facts, because Mr. Stern was a partner who had certain --

MR. GRUTMAN: I don't need the argument.

THE COURT: This is a parallel between Mr. Stern's conduct and --

MR. GRUTMAN: That they are both partners --

THE COURT: I sustain that objection.

Q Were you aware that Mr. Stern as a partner of Newbu Loeb at the time we are speaking of had this excess of $600,0 of positive capital?

A I was aware that -- yes, I was aware that Mr. Sterr who was a partner, which I was not, had that capital.

MR. GRUTMAN: Judge, I ask the Court to direct the witness to answer my question, which was simply whether he was aware that Mr. Stern --

THE COURT: He says he was.

Q Is it a fact that what you wanted, Mr. Gross, was the immediate payment of cash?

A Mr. Grutman, you are trying to put me in Mr. Stern' position. I can't permit that --

Q No, sir -- move that that be stricken.

THE COURT: Mr. Gross, just answer.

A Yes, I wanted my cash as befitting my position as a withdrawn general partner. It is a fact I wanted my cash.

Q And you wanted the payment of cash immediately, isn't that so?

A If that transfer went through, I was informed that the partnership was terminated, that the partnership had no right to keep my cash, so I wanted it immediately because it would have been a breach of contract.

MR. GRUTMAN: Move to strike that.

THE COURT: Strike out, "It would have been a breach of contract." I will let the rest of it stand.

Q Were you aware of any provision in the partnership agreement which entitled you as a withdrawn general partner to the immediate payment in cash of whatever your capital account was on February 8th?

THE COURT: He didn't say that, Mr. Grutman. There is no foundation for that question.

Q At the time you made the demand, was there any provision of the partnership agreement that you were aware which you say entitled you to the repayment to you then in cash of your entire capital account?

A The partnership agreement, Mr. Grutman, referred to a going business. If it was not a going business it was my understanding that I was entitled to my cash.

Q Were you aware of the provisions in the partnership agreement which provided for the priority that would obtain in the event of a dissolution or a liquidation?

A Article 9 of the partnership agreement specifically sets for the priorities of the liquidation.

Q And in the priorities of liquidation, was the first priority for general creditors?

A Mr. Grutman, Ithink I am going to be pretty sure of myself in my answer, but I want you to understand, I don't have it in front of me and it makes a certain difference. I think I can answer it offhand. I prefer not to be required to. If you want me to, I will.

Q To the best of your recollection, let me see if I can suggest it to you, that the hierarchy of payment in the event of a dissolution required that payment first be made to general creditors.

MR. MANDEL: Excuse me. Shouldn't we put the docume in front of the witness?

THE COURT: I think we ought to come up to the side bar, quite frankly.

(At the side bar)

THE COURT: May I ask why we are spending a lot of time on this? This man has said what his position is. He said why he wanted the money. What good does it do to argue?

MR. GRUTMAN: Because I want to demonstrate that he protested the **assumption** that he was asking for something that he knew he wasn't entitled to, and I'd like to do this without being encumbered by having to put documents in front of him and parse the document. I want to establish in a series of simple questions without Mr. Mandel on my heels that this man was aware that he was asking for something which he was not entitled to under the partnership agreement. And I will go on to another line.

MR. MANDEL: I think that is not true. But even if it were true it would be irrelevant. If --

THE COURT: I don't see that it makes the slightest bit of difference. If he wants to negotiate to something, why can't he negotiate to something even though the partnership agreement doesn't provide for it.

MR. SILFEN: He was then keeping his sister and friend out of the agreement.

THE COURT: That is a different matter.

MR. GRUTMAN: They didn't need his consent. He was asking for something that he wasn't entitled to.

THE COURT: You can argue that.

MR. GRUTMAN: I say the way he was going to get it was by using Bleich and Donoghue.

THE COURT: That is argument. He's said what his position was.

MR. GRUTMAN: If that is your Honor's view I will go onto another line.

THE COURT: It seems to me to spend a lot of time

with him going over priorities in the agreement that is in evid
is a waste of time. I gather you adopt my suggestion.

MR. GRUTMAN: I always adopt the Court's suggestion.

THE COURT: Sometimes it is only a suggestion.

MR. GRUTMAN: Judge, I do whatever you suggest, sure.

(End of side bar)

Q Mr. Gross, were you aware that the partnership agreement had been revised from the Golenbock and Barrel law firm for the year that was controlling as of 1970? There had been a revision of the partnership agreement, you were aware of that?

A They revised it at the instruction of the executive committee of Newburger, Loeb. They did the mechanics. We told them what to put in it.

Q Were you aware that the partnership agreement provided that when a general partner withdrew, his capital remained at the risk of the business for a period of twelve mo
following the effective date of withdrawal?

A I was only aware that a portion of his capital remained at the risk of the business.

Q What portion do you say at least remained at the risk of the business for a period of twelve months after the date of his withdrawal?

A 85 percent of his committed capital.

Q In the event of the withdrawal of a limited partner they were not entitled to the repayment of their capital until six months after the effective date of withdrawal, wasn't that what the agreement provided for?

A No, sir.

Q Except for the fact that they could withdraw ten percent a month up to the six month period?

A And at the end of six months they could get the balance of their 50 percent and then would no longer be limited partners, that's correct.

Q Did you understand that in negotiating as you were up to the date of the transfer agreement, you were asking for something in the negotiations as treatment for yourself which was beyond what the partnership agreement provided for?

A Oh, no, sir. I was only asking for my rights under the agreement.

Q You believed that if the transfer agreement did not go through, that in a liquidation you would be paid out, is that correct?

A I have so testified.

Q And in making that assumption, Mr. Gross, you did it as a non-accountant, correct?

A I did it as a businessman, Mr. Grutman.

Q Not an accountant?

Mr. Gross, that there was nothing in Exhibit W which said that if you didn't go along with the deal you'd be tied up in lawsuits for a long period of time?

MR. MANDEL: We went over this exactly yesterday.

THE COURT: Sustained.

MR. MANDEL: I hate to keep objecting --

THE COURT: Sustained. I think that is repetitious of yesterday. Sustained.

Q Is it not correct, Mr. Gross, that what Mr. Persky told you was that it would be better for you to go along with the deal as structured and try to convince Bleich and Donoghue to do so?

A "It would be better for you" can read many ways. Yes, Mr. Persky told me that I'd be a heck of a lot better if I went along, because he then continued to tell me what would happen if I didn't. He threatened me, no question.

MR. GRUTMAN: Move to strike the latter part.

THE COURT: Strike out the last sentence.

Q When Mr. Persky suggested that it would be better to go along with the deal as structured and to convince Bleich and Donoghue, did he make reference to you at that time of the various claims which existed against you?

A At one point in the conversation I think he just mentioned claims, and at another point in the conversation I'm not sure whether he spelled anything out. Of course, the Buckley claim he mentioned twice. The second time more forcefully. But he did and he offered me in a threatening fashion release to litigation.

THE COURT: Strike that out, the "threatening fashion."

Q Apart from the Buckley claim, were you aware at the time that these discussions were going on that there were various persons within Newburger, Loeb who had grievances which they were asserting against you, apart from the Buckley claim?

A I think yesterday I testified --

Q Could you answer that?

A I'm trying to.

Q Just yes or no.

A Except for Mr. Sloane and Mr. Kayne I knew of no one in Newburger, Loeb with a grievance against me and I still do not.

Q Had it been reported to you that Arthur Richenthal on behalf of the clients whom he represented, which were neither Sloane, Kayne, Berkowitz or anybody else among the promoters, claimed that his clients had claims against you for over a million dollars? Had that been reported to you?

MR. MANDEL: Your Honor, that is not relevant. Mr. Richenthal does not represent anybody who is a party in this case.

MR. GRUTMAN: On the issue of credibility, Judge, who was making the claim.

THE COURT: Overruled. Go ahead.

Q Can we have your answer?

A That was never reported to me.

Q Was it never reported to you that among the claims which were being asserted against you by others, even persons who were promoters of the new corporation, was a claim against you that you had improperly and without authority trade for the firm account?

A That was never reported to me.

Q No one had ever mentioned it to you?

A No one had ever mentioned it to me.

Q Nobody had ever castigated you for what you had done with the City Investing trading?

A No one had ever castigated me for what I had done with the City Investing trade.

Q Had anybody made a claim against you for the role which you had played in bringing Newburger, Loeb to make the investment which it did in the basketball team?

A No one had ever made such a claim against me. In fact, all of my partners actually joined in that, and I did not propose it to Newburger, Loeb personally.

MR. GRUTMAN: Move to strike out the latter part.

THE COURT: Sustained.

MR. GRUTMAN: Would your Honor instruct the witness when an objection is voiced, he should refrain from continuing his answer until you rule?

THE COURT: I will not instruct him accordingly, but I will say, Mr. Gross, to the extent that you can answer responsively we will move along faster and have less problems.

THE WITNESS: Yes, sir.

Q Among the claims which originated among persons other than those who were promoters of the corporation, was it ever told to you before February 8th or February 11th that there was a grievance against you for the loss sustained by Newburger, Loeb on the lease at One New York Plaza?

A No, sir.

Q Nobody ever mentioned it to you?

A No, sir.

Q Ned Frank never mentioned it to you?

A No, sir.

Q Have you read Mr. Frank's affidavit?

MR. MANDEL: I object.

THE COURT: I sustain the objection.

MR. MANDEL: I think the jury should be instructed to disregard that question.

THE COURT: Sustain the objection, disregard the question.

Q Did Leo Stern ever mention it to you?

A No, sir.

Q Had anybody ever said to you before February 11th that you had foregone the opportunity of getting a hundred thousand dollars from Sol Atlas if Newburger, Loeb would give up the New York Plaza lease?

A No, sir. With one caveat. If you say anybody, I told you that I am not certain, I don't believe Mr. Persky said it on January 15th. It is possible he did. If you mean anybody. If you mean any of my partners --

Q Yes, sir.

A No.

Q Was it reported to you that at the meeting of February 8th, Mr. Persky, the man who you say threatened you was reported by Mr. Silverman to have said, "The corporation wants no litigation. Everybody should release one another." From Exhibit FFF. Had that been reported to you?

A The meeting of February 8th?

Q Yes. February 5th, whatever the date is.

A I was there -- the only thing reported to me --

THE COURT: You can transfer the date.

A I have testified to you that the only thing reporte

MR. GRUTMAN: I intend to.

MR. MANDEL: Fine.

Q Whenever you personally knew or your lawyer personal knew, did you know before the answer and original counterclaim were filed that Finley, Kumble had filed or prepared the speci opinion letter which was part of the transfer agreement? Did you know that before you filed your original answer and counterclaim, and will you answer that simply yes or no?

A No.

Q Did your lawyer know it?

A I don't know what my lawyer knows, but I know my lawyer told me that he didn't find it out until later, I believe it was in the deposition testimony of Mr. Lawrence Berkowitz. In fact, I'm fairly certain that is what he told me.

Q Is it your testimony, Mr. Gross, that before you filed the answer and counterclaim which you did, you and your lawyer were not aware of the fact that Mr. Persky's opinion letter had been supplied to Mr. Mandel?

A I have testified that I was not --

Q Can you answer --

A I cannot answer for Mr. Mandel. I can answer for Mr. Gross. And I would like to --

MR. GRUTMAN: I have an answer, Judge, he did not.

MR. MANDEL: He was asked what was reported to him. I think he should be allowed to answer what was reported to him.

THE COURT: May I have the question read back, pleas

(Question read)

THE COURT: It is two parts. He's answered the first. I will permit him to answer the second. What did you know?

THE WITNESS: I did not know and do not know at this time personally that an opinion letter was supplied to Mr. Mandel and Mr. Mandel has informed me that he didn't know of the double opinion letter until later, so I have to presume that he didn't know.

Q What is the double opinion letter that you are referring to?

A One for the partnership and one for the corporation.

Q There was only one letter.

A I thought that there had been one for each party. In fact, that is my recollection even now.

Q You were aware of the Buckley claim before you filed the answer and counterclaim which did not include Persky and Finley, Kumble when you filed it, were you not?

THE COURT: Just yes or no, Mr. Gross.

THE WITNESS: Your Honor, please. I can't yes or no

AFTERNOON SESSION

1:15 p.m.

(In open court, jury present)

CHARLES GROSS, resumed:

MR. GRUTMAN: I have nothing further of Mr. Gross. Someone else can have him.

CROSS-EXAMINATION

BY MR. SILFEN:

Q Mr. Gross, as I recall your testimony two days ago, you were asked on a question regarding Miss Donoghue whether or not you recommended or invited her into the Newburger Loeb partnership.

Do you recall being asked that question?

A Something to that effect. Not specifically.

Q Let me ask you that same question with respect to Mr. Kayne and Mr. Sloane.

Would it be a fair statement to say that Messrs. Kayne and Sloane were invited or recommended into the Newburger Loeb partnership by you and perhaps two other then partners of Newburger Loeb?

A I would say that-- I would fairly say that myself and two other partners of Newburger Loeb conducted the negotiations with Mr. Kayne, but the decision for them to come to the partnership and the authority to "invite" them came from the partnership in the person of its executive committee, and senior partners.

Q Could you tell us if you can recall the comments that you made to the executive committee in or about the time that the executive committee authorized the invitation of Mr. Sloane and Mr. Kayne into the partnership?

A Well, I can only recall, not in detail, I can only recall that I thought it would be a fortuitous and profitable circumstance to have them.

In Mr. Kayne's case, actually it was a little later circumstance that was discussed because Mr. Kayne was not willing to commit himself as early as Mr. Sloane did. And when we spoke of executive commitment, I am certain that I strongly recommended that it would be good for Newburger Loeb to have them in, that our presence in California, the Los Angeles area, would be a profitable and good one for the company.

Q Is it an accurate statement to say, sir, that at this time, which I am talking about the latter part of 1969 or perhaps the early part of 1970, Newburger & Loeb, the partnership, was not yet situated in the State of California?

A Well, our full presence in California probably started around- I can't be too accurate, but the time frame

Q If I may, Mr. Gross, let me ask you to focus on--

A Let me say at the time of the executive committee meeting.

Q Let me ask you to focus on the events of the second to the last part of the month of July 1970.

A What do you mean by second to last?

Q Say about the middle of July 1970, and I will ask you to recall certain events.

I believe you testified that a time came when a meeting was held at the Hotel Navarro, when Mr. Therese, Frank, and Settel were all present, and as I believe you told us, the subject of that conversation had something to do with your resigning as managing partner, and the decision to bring Mr.Kayne into New York as first assistant managing partner, and then eventually as the managing partner.

A That was a part of it.

Q Is it not a fact, Mr. Gross, that prior to that meeting at the Hotel Navarro, you had determined, after consultation with your wife and others, that you were going to resign both as the managing partner of the partnership and as a partner of Newburger Loeb?

A I think I stated on either direct or cross or both that at that meeting I told the gentlemen that I had been-- well, I don't know what the word is, but it was in my mind to resign from the partnership and that, you know, since they came to me with that proposition, and I can remember distinctly standing there -- it was sort of a suite arrangement-- and I remember that -- "Perhaps you should step down as managing partner," and I very distinctly said, "Fine, it's been in my mind to resign from the partnership. I have spoken about it, and good, fine, I will resign the partnership now and not at some future date or whatever. This will be like the breaking up of my firm a year or two years before when Mr. Newburger talked to me."

Q The point I am trying to establish is that this decision, this determination which turned out to be coincidental was made before Mr. Kayne came to New York or that you knew that he was deciding to come to New York and before the meeting that you had with both Mr. Kayne, Mr. Sloane and the other partners of the partnership that I just mentioned to you?

A I can't go that fr. I can say that it was in my mind but that this event was the catalyst that made me declare that yes, I would resign, similarly as when Mr. Newburger invited me to Newburger Loeb and I said it was in my mind to break up Gross & Company -- no, when they asked us not to clear there any more because it was too much business,I said "It was in my mind, you have made up my mind for me."

In other words, it was in my mind that I wanted to resign. I don't know whether I would have found the circumstance, the time, I don't know whether it would have been that week or some weeks hence, but it was in my mind and that triggered it, and I said, "Fine, I will resign."

Q Do you recall that there were several references made during this trial to the arbitration proceeding between yourself, Mr. Kayne and Mr. Sloane?

A Correct.

Q Do you recall at that arbitration proceeding being asked the following question by Mr. Silverman --

A Mr. Who?

Q Mr. Silverman.

A I'm sorry. I thought you said Silfen.

Q I missed that one.

Page 1146. Going onto the top of the page you had been asked some questions about your meetings with Mr. Kayne during the month of July, 1970. You had testified that you saw him in early July of 1970 at an executive committee meeting and then the question was asked, as follows:

"Q Well, then, when was the second meeting?

"A The second meeting was held, I believe, some time in the third week of July.

"Q And where was that held?

"A It was held at the Hotel Navarro, in New York City.

"Q Could you describe the circumstances surrounding that meeting and what was discussed?

"A Yes. I had been on a three-day weekend and when I came back to the office on Monday the following, the precise date of which I do not recall, I was then informed by Mr. Settel that Mr. Frank and Mr. Therese had flown to the West Coast the previous Friday to meet with Mr. Kayne and Mr. Sloane and to discuss with Mr. Kayne and Mr. Sloane the affairs of the partnership.

"As a consequence of that meeting, when Mr. Frank and Mr. Therese returned, I believe they returned to work on Tuesday, they told me that Mr. Kayne and Mr. Sloane planned to come to New York and wanted to meet with me relevant to the affairs of the partnership.

"We had that meeting at their rooms in the Hotel Navarro on Central Park South. While I had been away on that weekend in consultation and in conversation with my wife and others, I pretty firmly had reached a decision to retire from the partnership. I reached that decision because I felt I was not making the headway with the partnership that I had hoped. Things are certainly not and had not happened as planned, and that it would perhaps be a good idea if I did resign.

"So when we met with Mr. Kayne and Mr. Sloane, I should mention that at that meeting Mr. Kayne, Mr. Sloane, myself, Mr. Settel, Mr. Frank and Mr.Therese, they said to me that they had reached the conclusion that I should step down as managing partner, and Mr. Kayne or Mr. Sloane, preferably Mr. Kayne, I believe, should come east and function as managing partner.

"I informed them that I had just that weekend coincidentally determined that I would like to resign from the firm and that I planned to do so."

Do you remember being asked that question? Do you remember giving that answer?

A Yes.

Q At that meeting at the Hotel Navarro, Mr. Gross, were conclusions reached on how the transition of power should take place or was to take place between you as the outgoing managing partner and Mr.Kayne as the prospective incoming managing partner?

A Yes.

Q Could you tell us, to the best of your recollection, what that procedure was and who suggested the procedure?

A Well, to start with, what it was, was that as I testified, Mr. Kayne would come east on the first Monday of August - it turned out to be August 3rd - that he would come and he would function as assistant managing partner for the two-week period, at which time I would, as I had planned, go on vacation for two weeks, and that when I came back from vacation I would resign as managing partner in Mr.Kayne's favor.

When you say "Who suggested the plan," the plan was a work-out of discussion. I had a part in formulating it. I have to say almost everyone did. This was a group of viable people.

Q The ultimate decision on this transitional arrangement, is it fair to say that that decision of this modus operandi had your approval?

A It couldn't have existed without it.

Q And is it fair to state that at this meeting the other members of the partnership,when they heard that you intended not only to step down as managing partner, but to resign from the partnership, were troubled and upset and urged you not to do so?

A Well, if I may, I didn't say that they heard that I intended to step down. They came to me with that. They came to me with a proposition that I step down, and I said I intended to probably resign from the partnership, that that was the directionof my thinking, and I had virtually made up my mind.

They were troubled and did not want me to resign from the partnership. I have testified to that.

Q As a result of their request for you not to resign from the partnership, did you in fact advise them at that time that you would not do so at this time, or at that time, that is, resign from the partnership?

A I agreed to stay in the partnership for a while longer. My agreement based upon the discussions of that meeting, in other words.

Q Is it a fair statement to say,Mr. Gross, that you told the people assembled at the Hotel Navarro that you would stay on until October 31, 1970?

A I think that is the time that I said. I would resign as a partner effective October 31,1970; yes, that is the time I said at that meeting.

Q As a result of the conclusion reached at the Hotel Navarro, did a time come when you in your capacity as managing partner circulated a memorandum to all of the personnel of Newburger Loeb informing them of the coming of Mr. Kayne?

A IT IS PROBABLE. I see you have reference to it. I can't deny it. It is probable that I would.

Q Let me show you what we have marked as additional Defendant Kayne Exhibit C for identification, which I showed to Mr. Mandel at the recess,and ask you whether or not that is your signature which appears at the bottom.

(Pause)

A Certain.

MR. SILFEN: Any objection?

MR. MANDEL: No, your Honor.

THE COURT: Received.

xx (Defendant Kayne Exhibit C received in evidence)

Q Since it is very short, Mr. Gross, would you mind reading it to the jury?

A Why don't you read it?

MR. SILFEN: Okay.

(Mr. Silfen read to the jury from Defendant Kayne Exhibit C in evidence)

Q Do you recall Mr.Therese and Mr. Frank saying to you before the Hotel Navarro meeting that Mr. Sloane and Mr.Kayne wanted to come to California to talk to you about opinion at that time, that is, in August of 1970, whether or not the suggestion made by Mr. Kayne to the executive committee that Newburger & Loeb Company should go out of the clearing business was a reasonable and prudent suggestion to save money for the partnership?

A There was debate at that time about it. It wasn't something that everybody fell in line with. We may have discussed it at the Hotel Navarro meeting in some peripheral sense. There was discussion about what might be good, what might not be good, what the timing should be, et cetera.

I don't know whether I agreed with it in intellectual substance, but I did go along with it.

Q You were also present at the time that the suggestion was made by Mr. Kayne in his quest for authorization to continue negotiations to terminate the lease at One New York Plaza?

A I don't remember that as being a subject of the meeting. I remember that he was talking about the lease in the White Paper, his remarks. I think he talked about his wanting to make efforts to get out of the lease.

I don't remember request for authorization, as such.

Q Did you form an opinion at that time, Mr. Gross, that Mr. Kayne's position with respect to a termination of the lease at One New York Plaza was a reasonable and prudent move for the benefit of the partnership?

A I didn't have to form it at that time. We had made many investigations of the termination of that lease as far back as March and April of 1970, had at that time consulted with counsel, and then had had the benefit of counsel at an executive committee meeting, the minutes of which are here, in which it was decided that we thought, validly or not, but we thought that the cost of going out of that lease would be too great a penalty, let's put it that way, that the penalty the landlord would attempt to impose would be too great and that we should play along-- I don't mean play along, but continue on and explore, considering that, but exploring other things, and we made no definitive move.

As to whether Mr. Kayne's suggestion that we get rid of the lease being reasonable, we were of that opinion six months earlier.

Q Were you aware of the fact-- I believe that the counsel you are referring to would be Golenbock & Barell.

A That's right. At that time we met with them.

Q In connection with getting out of the lease?

A Specifically.

Q Were you present at a meeting when the discussion the preparation of at least the second page of that document.

THE COURT: At this time I will permit it in evidence against the Gross defendants.

We will see if it is connected to anyone else.

(Additional Defendant Kayne Exhibit H received in evidence)

Q I think you said, Mr. Gross, that although you couldn't definitively say whether you saw this document on November 8th at the offices of Golenbock & Barell, it may have been that you may have seen it shortly thereafter?

A I had a copy that was given to me at one time in which I wrote October 1970, but it is in the same time frame. That was not presented to me. That wasn't a proposal made to me, Mr. Silfen. That was made and given, I believe, to the Newburgers and Sterns.

MR. SILFEN: I'd like to read that to the jury, your Honor.

(Mr. Silfen read to the jury from Additional Defendant Exhibit H in evidence)

Q Mr. Gross, the question I have for you is this:

Is it not a fact, sir, that in the latter part of 1969 or the early part of 1970 at a meeting of the executive committee of Newburger & Loeb Company, the partnership, you, in fact proposed transformation of the partnership to some form of a corporation?

A Actually, what happened and what I believe is reflected in the minutes is that from the restructuring of our partnership agreement we restructured it as to points rather than percentages, so that if at some future date we did incorporate and thought it was a good idea to incorporate, this would be a stepping stone and would make it easy to incorporate because points could be transferred into share ownership better than percentages.

Q Would it be a fair statement to say, sir, that at this executive committee meeting you, whether you originated or introduced this idea, adhered to it, that is, you thought it was a good idea, maybe at some future date to incorporate?

A Yes. We had in fact as a firm I think had undertaken or had undertaken for the firm some studies on the matter and the studies of course were designed to tell us whether or not it was a good idea.

It was certainly a good idea to explore and that's really as far as I can go with you. It was a thing that many member firms were doing and had done and we thought it was worth exploring on our part.

I think we asked the lawyers to make some studies.

I can't say I thought it was a good idea. I thought it was a good idea to study.

Q I think you testified this morning that even though you had tendered your resignation from the partnership on August 31st to be effective September 30th, and even though you were not around at the partnership place of business during the month of September, you had some knowledge of what was going on at the partnership?

A No, I was arond a little during the month of September. I was functionless. In other words, it related to the partners. I had some knowledge of what was going on, yes. [illegible]ner Newburger or Stern, for instance, told me that Kayne had made this offer to them and they had been advised to reject it, by their counsel. I knew things of that nature. Many of the things I didn't know I learned later when we had discovery access to the minutes. Many of the things I knew, they were non-clearing. I could say I knew many of the things that went on in the partnership. People were let go when they became non-clearing.

When things got better in the fall, commencing October 1st, like the day after, I was aware of how that would affect the partnership.

That is when they sold the basketball team.

Q Did I hear you say you knew when they sold the

Q Did a time come, Mr. Gross, that you became aware of the fact that Mr. Kayne had asked to be relieved of his responsibilities as managing partner and in fact was going to resign from the partnership?

A The time came that I became aware of that.

Q Can you tell me when that was, if you recall?

A In the course of preparation for the arbitration. In other words, quite a bit later-- no, I became aware of it, I think, from-- what do you call it -- discovery proceedings in this action when we received minutes of the executive committee. That is when I became aware of it.

Q Did you have any dealings with either Mr.Kayne or Mr. Sloane during the months of September, October, November or December of 1970?

A I think I met Mr. Kayne once in that time frame-- well, in September as I say I was around the office. I don't think I had any dealings-- you stopped in December, right?

Q Right.

A Okay. I want to be as accurate as I can. I think I met Mr. Kayne once in that period probably in mid-or late October. I didn't meet with him. I was in the offices of Newburger Loeb & Co. and I met and spoke with Mr. Kayne.

Q How about Mr. Sloane?

A I have no recollection of seeing him in that period of time through December.

Q I recall your testimony about a meeting that you had with Mr. Kayne in January of 1971.

A Yes.

Q I think that you testified that that meeting took place on January 23, 1971.

A I said on or about. That is my best recollection. But that doesn't fit in the framework.

You asked me the first question through December.

Q That's right. We have taken you through the end of December with Mr. Kayne and Mr. Sloane.

Now I am talking about Mr. Kayne--

A Right.

Q How many meetings did you have with Mr. Kayne from January 1, 1971,let's say until February 11, 1971?

A I think the meeting I testified about was the only time that I saw him in that time frame.

Q Did you have any face-to-face meetings with Mr. Sloane during the same period of time?

A Just the one I testified to-- not face to face. Telephone.

Q Telephone call?

A That's all.

el:mg 33 Gross-cross

Q Other than the meeting with Mr. Kayne and the telephone call to set up that meeting, did you have any other telephone calls with Mr. Kayne from January 1, 1971 to let's say February 11, 1971?

A I'm not sure whether or not Mr. Kayne was on the wire or actually was present when Mr. Sloane called me and said "we." I know them. No one spoke except Mr. Sloane. He said "we." And Mr. Kayne may have been on the wire, because there were occasions when I had conversations with them in California in the past when they were both on, but I can't say.

Q As I recall your testimony of Monday, among other things you said two things were said to you at that meeting which Mr. Kayne, and I am referring to the meeting I believe at Schrafft's Restaurant, whether it took place on the 23rd or some other day.

A I think it was the 23rd. That's my recollection of the date.

You know, my best recollection of the date.

Q It may have taken place at an earlier date, is that right, Mr. Gross?

A No, if it took place at an earlier date, it could have been a day earlier. What happened was, one day while driving here I was trying to put days to dates as far back as then, and I got the 23rd on a Saturday, and I think the meeting took place on a Friday. So I might have been a day off. That is the only reason that I am not sure in my mind that it was the 23rd. I remember the date, the 23rd, as firmly fixed in my mind, except that I can't put that date together. There may have been a leap year in between, I don't know.

Q I think you testified that Mr. Kayne said to you that the deal was going through with or without the consent of Miss Bleich and Mrs. Donoghue.

A No, I think I testified that he said the deal would go through with or without the consent of Mrs. Donoghue. Not Miss Bleich.

Part of the thing was to make sure, he was trying to get me to make sure that Miss Bleich gave in. But Mrs. Donoghue he talked about.

Q I think you also testified at that meeting that Mr. Kayne told you something about a lawsuit that he was planning to commence with Mr. Sloane against you?

A I'm not certain that he mentioned Mr. Sloane. I think he very probably did. But I know the lawsuit he was planning to commence. At least the lawsuit was certainly a topic of discussion.

Q Did Mr. Kayne tell you the reason he wanted to meet with you was because his California attorney suggested to him that rather than go into litigation it would be best if you and he met privately to try and resolve your differences?

A I don't recall that. Mr. Kayne didn't try to resolve any differences with me. And I didn't really know at that time the differences he was referring to as between Mr. Kayne and myself.

The differences he tried to resolve were the differences-- or didn't even try to resolve, that the meeting was called about, was the transfer agreement itself.

If he said that, that is what he talked about, was the transfer agreement, and I had the feeling that if I didn't object-- didn't have an objection to the transfer agreement and induced Miss Bleich to go along, et cetera, I wouldn't be sued in California. But that certaionly is not the resolution of any differences Mr. Kayne and I had on the matters he sued me about.

Q I am wondering whether the answer to the question is yes or no as I posed it to you rather than the long dialogue.

A Could you reframe it? I think I answered it as best I can.

Q In the future maybe if you could answer it yes or no without the long dialogue, it might be better.

A If your question was did he try to explain to me that his attorney in California said that he wanted to resolve our differences, the answer then would have to be, on balance, no.

Q It is a fact, isn't it, that your signature to the transfer agreement was not required?

A Whether it was required is a legal conclusion that I can't give you as a fact. I can only give you an understanding. The understanding is that, that I have, is that my signature was not required. But that is certainly, from my mouth, not a fact.

Q So notwithstanding the fact that your signature was not required, and Mr. Kayne told you that as far as he knew or was concerned, that the transfer agreement was going to go through with or without the consent of Mrs. Donoghue, is it still your testimony that there was something that Mr.Kayne wanted from you at that Schrafft's meeting?

A Absolutely. He wanted --

Q Your claim is that he wanted you to convince Miss Bleich to sign?

A And not to object to the transfer agreement, not to cause any trouble, and to just in essence quietly slip away into the night.

ing that and you are to continue to honor it. All right, gentleman. Let's go forward. Anybody else?

MR. MANDEL: Your Honor, I have one open --

THE COURT: Yes, you do. I am going to, absent -- let's put it this way.

On the state of the present record I am going to all you to put in evidence, the proof that you are asked, on Mr. Gross' experience as a trader during the years set forth in that schedule. You have got to lay a proper foundation, however, for it.

MR. MANDEL: All right.

THE COURT: And then anyone may cross examine who is so inclined.

MR. MANDEL: On that subject.

THE COURT: On that subject, yes.

CHARLES GROSS, resumed.

REDIRECT EXAMINATION

BY MR. MANDEL:

Q Mr. Gross, I show you MMMM for identification and ask you if that is a document which you have prepared?

A Yes, sir.

Q What does that document consist of?

A This document is a statement of the profits I made -

MR. SHAW: Objection, your Honor.

THE COURT: Let's go at it so we lay the foundation. Ascertain whether he ever engaged in trade, and over what period and did he keep records and is this a compilation of his records.

MR. GRUTMAN: That is the point, Judge. I think the point of Mr. Shaw's objection was, and I join in it, the document as it was presently related to us is a compilation of certain documents which we have never seen.

MR. SHAW: If Mr. Gross were to bring in and have available to us to examine the underlying documents which he summarized in that document and we had a chance to check its accuracy, rather than having all the tax returns and bank statements, et cetera, we certainly would agree to a summarization of these lengthy documents. What I object to is a preparation of a summary or schedule of his documents without having an opportunity to see what is behind it.

MR. MANDEL: Your Honor, the normal procedure is to do it this way and the underlying documents are here for cross examination. I make that representation. That will be the foundation. The proper procedure is for me to put the summary into evidence so that counsel can cross examine to their heart's content on the underlying documents.

THE COURT: Just so long as the underlying documents from which this was prepared are available, it matters little whether they are physically marked with a tag or not as long as they are in the room and available. If, on the other hand, Mr. Grutman shakes his head, if you wish to have him put in -- Mr. Grutman, do you insist that the underlying record be marked in evidence?

MR. SHAW: Yes, I do.

MR. GRUTMAN: I want to see them, Judge. I'm not interested in prolonging anything, but I want to see the documents before I am asked to accept the summarization.

MR. SHAW: My recommendation would be to do this subsequently so as not to waste time.

MR. GRUTMAN: If we can look at the documents so they square with what they purport to represent --

THE COURT: Mr. Mandel, if you could put eight ledger in front of the witness and mark them, and then Mr. Mandel could then say, "Did you prepare this schedule from them?" the answer is yes, and they would be received in evidence. The question is whether you are willing to accept Mr. Mandel's representation that they are here and available.

MR. SHAW: I want them marked, your Honor.

THE COURT: All right. We will have them marked.

BY MR. MANDEL:

Q Mr. Gross, will you call off one by one, Mr. Rothman, will you please come up with the marking machine and the stapler so that we can mark the underlying documents?

Mr. Gross, would you call off one by one for marking the underlying documents which are used in Defendant's Exhibit 4M for identification?

A Gross and Company report for year ended December 31, 1964.

MR. MANDEL: Is that in evidence?

MR. SHAW: No, just for identification, your Honor.

THE COURT: No, if you want to do it the longer way, the underlying documents have to be in evidence. If you don't want to do it that way, there is no point in marking them for identification because that serves no judicial purpose.

MR. SHAW: I assume that quadruple N is authentic, your Honor.

MR. MANDEL: He has authenticated it.

MR. SHAW: I make the same objection I made before with respect to relevancy. I don't need to waive that. That has been overruled so I have no further objection.

THE COURT: I don't understand your position on relevance.

MR. SHAW: This was previously argued, your Honor, that this is speculative, it's remote, it's unrelated to the issue. In other words, what is income from trading during previous years was we say has no relevancy to any claim of damage with respect to the Rafkind account. We made two objections. The second objection as a second nickel objection. The mere fact that I'm not objecting to the authenticity is not intended to be a waiver of the first objection.

THE COURT: Mr. Mandel, why don't you mark each and every one and then we will just read the numbers into the record. You can show the entire page to counsel. You can look at the entire page at one time and determine what their position is.

(Pause)

MR. MANDEL: Exhibit 0000 for identification is Gross and Company report for the year ended December 31, 1965.

Exhibit PPPP is Gross and Company report for the year ended December 31, 1966.

Exhibit QQQQ is Gross and Company report for the year ended December 31, 1967.

Exhibit RRRR is Gross and Company report for the year ended December 31, 1968.

Q Mr. Gross, what is this? SSSS for identification is

A A series of monthly trading account results from Cohen, Simonson, Rea through September 7, 1972, through September 28, 1973.

MR. MANDEL: That is SSSS for identification.

THE WITNESS: TTTT are the trading schedules of Gross profit, exchanges, expenses, net profit, et cetera, from Bruns Nordeman, which was a merger of Cohen, Simonson, Rea, and Bruns Nordeman Company from October '73 through March, 1975. These are on a fiscal year basis and my schedule breaks them down into a calendar year basis.

MR. MANDEL: I offer Exhibits 0000 through TTTT inclusive in evidence.

MR. SHAW: Your Honor, with respect to RRRR, QQQQ, PPPP, 0000 and NNNN, I merely make the same objection that I made before with respect to relevancy.

MR. GLATZER: We joint in that objection.

MR. SHAW: Your Honor, I reviewed SSSS and TTTT and I make the same objection as before. I'd also like an opportunity later to review this more fully.

THE COURT: They may be received.

BY MR. MANDEL:

Q Did you engage in stock market trading in the year 1964?

A I did, sir.

MR. MANDEL: Before I proceed further, do you gentlemen want me to go through the whole thing or can we get right to the exhibit?

MR. GRUTMAN: Why don't you do anything you can to save time.

Q I offer MMMM. Can you explain what your MMMM consists of? Does it come from the underlying papers which have just been received in evidence?

A It does.

Q Does it show the average capital in thousands of dollars and the profit in thousands of dollars made on your trading in each year set forth or period set forth?

A It does. It also shows the percentage return on capital.

Q During each relevant period?

A That's right.

Q Did you calculate an average profit on capital over the entire period of trading set forth in Exhibit MMMM?

A I did.

Q Is that also set forth on the computation?

A Yes, sir.

Q Did you show certain appropriate footnotes, A, B, C and D to explain portions of the computation?

A Yes. I set forth my average profit percentage of 98.44 percent --

MR. SHAW: Objection. The document speaks for itself. May we see the document?

MR. MANDEL: Yes. You may see the document. I now offer it in evidence.

(Defendant's Exhibits NNNN through TTTT were receive in evidence.

MR. SHAW: May I ask a few questions on voir dire?

THE COURT: To what end, Mr. Shaw?

MR. SHAW: To establish that this document, the summary, doesn't accurately summarize the information contained in these documents, NNNN.

MR. MANDEL: I think that is cross, your Honor.

MR. SHAW: It doesn't set forth a figure because it sets forth an interpretation, specifically the interpretation set forth in the footnotes A and B.

THE COURT: That doesn't go to anything having to do with the document, it may be a basis for an objection for it in that certain portions don't come from the underlying exhibits. Mr. Mandel, there are certain footnotes here?

MR. MANDEL: Yes.

THE COURT: Is Mr. Shaw correct in the position that he takes?

MR. MANDEL: Your Honor, the footnotes explain the computation.

THE COURT: Then I think you better have Mr. Gross give some testimony as to the notes before it goes into evidenc

MR. SHAW: I am specifically referring to the years

'66, '67 and '68.

MR. GRUTMAN: My objection is specifically to footnote B.

BY MR. MANDEL:

Q Do you have a copy before you, Mr. Gross?

A Yes.

Q I note that you have the year 1975 without qualification. Should that be corrected or amended to show a portion of 1975?

A The documents from which I got this information indicate, and this was based on only the first three months of the year 1975, so that -- well, it couldn't be a full year.

Q Would you please, therefore, write on MMMM under 1973, first three months?

(Witness writes)

Q Mr. Gross, will you please explain footnote A?

A Footnote A is a description of how I computed average capital in any given year for the years 1964, 1965, 1966, 1967 and 1968. And I explained that it is computed by averaging the starting and ending capital of the year, in the computation of average capital, and subtracting from that average of capital, the averaging the capital -- the starting and ending capital for the year in Gross and Company, in the entire entity. I subtracted from that the minimum capi requirement of the New York Stock Exchange for the conduct of business of $50,000 which also, of course, takes into account monies that we had in a bank account --

Q Special account not available for trading purposes?

A A regular checking account.

Q But not available for trading purposes?

A Right. I further subtracted from that one-half the cost of the firm's membership in the American Stock Exchange for those years in which the firm was a member of the American Stock Exchange because with no arbitrary way of doing it I did not subtract the full amount, but I allocated half the cost to the conduct of the brokerage business and half the cost to trading.

Q In other words, you charged --

A I could have subtracted it all and reduced the capital.

Q You charged yourself with one-half of the cost of the seat although that was not a sum available for trading?

A That's correct.

Q And in that way you reduced the indicated profit on the funds actually used for trading?

A I reduced the percentage of profit.

Q Yes.

A Then I further, I added -- not subtracted -- added one-half the cost of my personal membership on the New York Stock Exchange because Gross and Company did not own the seat, the membership on the New York Stock Exchange, I owned it personally and, therefore, it was not in our balance sheet as a function of capital. So I added to the starting capital one-half the value of the membership with the same rationale t one-half would be applied to the conduct of a commission and general brokerage business and one half would be applied to trading, though again I diminished the return of the actual capital, on the actual capital used. That was footnote A.

Q Will you explain footnote B, please?

A Yes. As shown in the closing statement for the year 1968, there was an unrealized profit delineated and in effect it was not subject to any further fluctuation. That existed as a result of Gross and Company's trading activities. Since Gross and Company ceased doing business on December 31, 1968, but for tax returns this profit was realized on January 2nd or 3rd or thereabouts of 1969 so as to defer tax implications, I took that unrealized profit, I couldn't properly ascribe it to one year because such profits had been carried in previous years from one year to the next. There were always locked-in, unrealized profits, and I arbitrarily took that money which was a profit in trading and assigned it to 1968, 1967, and 1966.

Q This was a profit that was locked in at the end of '68 but unrealized for tax purposes?

A That's correct. And could have no further fluctuations.

Q It was hedged, is that what you say?

A We have been through this before. I was long a large amount of one security and short against the books of that same security, as has been explained in this court, to defer tax implications.

Q And you actually realized that profit in the first few days of '69 but allocated it back?

A The first practical business day of 1969 that it could be done.

Q Will you explain footnote C?

A Yes. Footnote C now refers to the time when Gross and Company was no longer in existence. I was no longer a partner of Newburger, Loeb and Company and I had started to work as an employee and trader of Cohen, Simonson, Rea and Company which continued through Bruns, Nordeman, Rea and Company because at that certain time $300,000 were available to me as buying power, the amount of securities that I could purchase, and at that late time it went to $500,000 and because March general requirements on the New York Stock Exchange and Federal Reserve system during this period was 50 percent, I used the assumption that the capital necessary for me personally to have the buying power that was allocated to me was one-half the amount of the buying power. So that whereas when I had a $300,000 buying power, I attributed a $150,000 capital. Where I had a $500,000 buying power, I attributed a $250,000 capital. And in 1974 when my buying power was increased by my employers I had prorated it and I attributed a $175,000 buying power by averaging the buying powers of the year.

Q Will you explain footnote D?

A Yes. Profit as stated for the years that I worked for Cohen, Simonson, Rea and for Bruns, Nordeman, Rea -- I might add it applied to every year -- was net of all expenses chargeable to my trading activities, such as clearance charges, those are the charges that the firm charges my trading accoun for processing the business, floor brokerage, that means the cost of having brokers execute the transactions on the floor of the New York Stock Exchange, interest charges, private line charges, which means my private telephones, I think they are called private lines, where I just press a button and I can speak to personnel on the exchange or personnel downtown in their offices, **data retrieval charges, which involves the** communications equipment that is put on my desk. I have what is called a Bunker Ramo set which gives me information relative to stock totals by processing various codes. Stock market advisory services that I subscribe to, stock market charts that I subscribe to, and I say et cetera, because it includes all such costs, long distance telephone calls that I make in the course of my business, et cetera. And the profits, therefore, that I set forth here are net of all such charges.

Q I'm not sure I asked you, the figures of capital and profit are set with elimination of the three zeroes.

A Yes. They are in thousands. You did ask me.

Q Where it says 475, that means --

A $475,000.

Q In your opinion, does Exhibit MMMM fairly summarize the percentage of average profit realized by your trading activities during the period set forth on the exhibit?

MR. SHAW: Objection, your Honor.

THE COURT: I assume it's either a mathematical figure based upon the profit --

MR. SHAW: Your Honor, I think his opinion is the ultimate question for the jury to determine.

THE COURT: I don't think it is a matter of opinion

MR. SHAW: Secondly --

THE COURT: Mr. Shaw, I don't think it is a matter of opinion. He has put in some figures which the testimony is comes from these charts. They either are a percentage of something or they are not a percentage of something.

MR. SHAW: I have an underlying objection to the document as not setting forth a summarization of what is set forth in these financial reports.

THE COURT: I overrule that objection.

MR. GRUTMAN: Do you understand that by the nature of the objection, this document which Mr. Mandel now proposes to offer as the true reflection for the whole year is based as the footnotes have just told us, about certain premises and certain manipulations and certain artificial averaging --

THE COURT: That is cross examination. He said that the figures come from the prior exhibits and the footnotes are based upon the testimony that is now in the record.

MR. SHAW: Could I conduct a voir dire on the admissibility of this document?

MR. GRUTMAN: If you took January and December, the opening and closing balance --

THE COURT: I can't do that, Mr. Grutman. All I can do is take what's before me in the way of foundation. He has said the figures are taken from prior exhibits that are now in evidence. The footnotes are based upon the testimony that has just been given. On that basis I will admit the exhibit in evidence. You may cross examine as to the weight that can be attributed to it.

MR. SHAW: Without a voir dire on the admissibility.

THE COURT: I don't see anything to voir dire about.

MR. GLATZER: Your Honor, we have an objection on the competency of the exhibit.

xxx (Exhibit MMMM was received in evidence.)

MR. MANDEL: May I show it to the jury, your Honor?

THE COURT: You may.

(Pause)

MR. MANDEL: Gentlemen, he is your witness when the jurors are finished.

MR. SHAW: I think I might ask the witness the questions even though the jurors are looking at the schedule --

THE COURT: I think you better let them have a look first.

(Pause)

RECROSS EXAMINATION

BY MR. SHAW:

Q Mr. Gross, I direct your attention to the year 1964. That is the first line on the schedule, correct?

A Yes.

Q Under the column captioned "Profit" there is a figure 475, correct?

MR. MANDEL: I don't see how there can be recross since I asked Mr. Gross no questions.

MR. SHAW: But Mr. Grutman asked some questions and so did Mr. Silfen, your Honor.

THE COURT: How long are you going to be?

MR. SHAW: No more than ten minutes, your Honor.

MR. MANDEL: I have another problem, your Honor. I have Mr. Lauterbach, an accountant, here to testify and he says he can't testify tomorrow morning. I will be very quick with him, but I cannot vouch for my brethren.

MR. GRUTMAN: I offered to stipulate the testimony of this witness with Mr. Mandel.

THE COURT: Will you be more than an hour?

MR. MANDEL: I think not.

THE COURT: Why don't we take our break right now. We will go from 4:30 to 5:30 and we will take the accountant.

(Recess)

THE COURT: Mr. Mandel.

IRVING S. LAUTERBACH, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MANDEL:

Q Mr. Lauterbach, will you please state your professi qualifications?

A I am a certified public accountant in the states of New York and Ohio.

Q How long have you been a certified public accountant in New York?

A In New York, since 1960, fifteen years.

Q Are you a member of a firm of accountants?

A Yes, I am.

Q What is the name?

A Clarence Rainess and Company.

Q Are you a member of that firm?

A Yes, I am a partner in that firm.

Q I show you Finley, Kumble I for identification and ask you if you know what that is.

A Yes.

Q What is that paper, sir?

A This is a report by a certified public accounting firm to the partners of Newburger, Loeb and Company concerning their financial position and results of operations for the year 1970.

Q Made by which accountants?

A The accounting firm rendering the opinion is Peat, Marwick, Mitchell and Company.

Q Did there come a time when I asked you to review certain papers in order to determine your opinion of the correct capital balance of Charles Gross, Newburger, Loeb and Company, as of December 31, 1970?

A Yes, you did.

Q What papers did you examine in that connection?

A I went to the offices of the Peat, Marwick, Mitchel and Company and looked through all the work papers of this audit and engagement relating to the statement on which you just showed me their opinion.

Q As a result of this examination, did you prepare a computation of your opinion of the true capital of Mr. Charles Gross, Newburger, Loeb and Company, as of December 31, 1970?

A Yes.

Q Did you prepare that in written form?

A Yes.

Q I show you Defendant's Exhibit VVVV for identificat and ask you what that is.

A That is a copy of the results of my examination of those papers and my opinion with regard to them.

Q In your opinion, based upon your examination of thos documents, was Charles Gross' capital account in Newburger, Loeb and Company on February 11, 1971?

MR. SHAW: Objection.

MR. GRUTMAN: Objection.

THE COURT: You want the exhibits in evidence?

MR. SHAW: Yes, your Honor.

MR. MANDEL: I offer it in evidence.

MR. SHAW: No, your Honor, the underlying documents. He is testifying based upon facts that are not in evidence. How can he be cross examined?

THE COURT: Let me see.

(Pause)

MR. MANDEL: Gentlemen, the Peat, Marwick files are subpoenaed. If you wish we can go back to this and spend two or three days on it. I suggest --

MR. SHAW: Your Honor, we heard this --

THE COURT: These are papers that were prepared for the partnership by the accounting firm employed by the partnership, is that right?

MR. MANDEL: The Peat, Marwick papers, yes.

MR. SHAW: He is talking about work papers.

MR. MANDEL: Work papers, yes. Excuse me, your Honor, are you looking at --

THE COURT: I am looking at VVVV.

MR. GRUTMAN: That is prepared for Mr. Mandel for litigation, Judge.

THE COURT: I know.

MR. MANDEL: But the Peat, Marwick papers were prepared by the partnership to underlie the year-end statement, and this gentleman examined all those schedules and has notes on them and raises certain disagreements and has his own opinion.

MR. SHAW: I am merely saying that the schedule without the underlying work papers is unintelligible. We have no idea what in this mass of work papers he is relying upon. Just as the financial statements were necessary to support the statement of Mr. Gross' income during the years, we think that the work papers are important for us to see.

THE COURT: Come up here.

(At the Bench)

THE COURT: You were prepared to stipulate to this man as little as ten minutes ago. I don't quite understand the switch here, but in any event, these are documents that are available and they started out as being the papers of an accounting firm employed by one of the parties to this action for the purpose of preparing an accounting -- a balance sheet and a profit and loss statement, I assume --

MR. MANDEL: Which is in evidence.

THE COURT: For one of the parties to this action.

MR. MANDEL: Yes.

THE COURT: I think given that I'm not going to get down into the niceties of bringing down Peat, Marwick and

Mitchell and having somebody from them come and putting everything in, unless you want me to do it in any event I will enforce the subpoena tomorrow. I will take this man's testimony now. I will enforce the subpoena tomorrow and I will bri all of that stuff in and you may --

MR. SHAW: That is fine, your Honor.

MR. GRUTMAN: It is not fine with me.

MR. SHAW: I'm not saying anybody from Peat, Marwick must come testify as long as the work papers are available.

THE COURT: I am going to enforce the subpoena and get them there.

MR. GRUTMAN: This is to waste time.

THE COURT: I know, but it is Mr. Shaw who asked to do it.

MR. GRUTMAN: Are you serious about that, Mr. Shaw? May I make a suggestion? We never saw this.

MR. SHAW: I have never seen it either, your Honor.

MR. ROTHMAN: Mr. Brout testified saying he had only asked certain portions of Peat, Marwick's work papers and they didn't bring the work papers here at that time.

THE COURT: I didn't raise that objection.

MR. MANDEL: That's right, I didn't. And I don't think --

THE COURT: I am dealing with this situation as best I can.

MR. SHAW: Do you have an extra copy of that exhibit? May I just look at it for a second.

MR. MANDEL: I don't have it here.

MR. SHAW: Is he going to testify to anything othe than this is his schedule?

MR. MANDEL: I am going to let him give his opinio and these are his schedules and turn him over to you.

MR. SHAW: What is the figure that he testifies to?

MR. MANDEL: There it is.

MR. SHAW: You know what it is --

MR. GRUTMAN: $337,921.

MR. MANDEL: You have it in the answers to interrogatories and you have all the differences --

MR. GRUTMAN: This will go on forever. There are fifteen different items.

MR. SHAW: I will let it go into evidence.

MR. GRUTMAN: What happens after that, Mr. Mandel?

MR. MANDEL: You cross examine the witness.

MR. GRUTMAN: Fine. That's the end of it.

MR. SHAW: I'd like it understood he is not going to testify with respect to other things he saw in the work pap at least in direct examination. He is going to say this is hi opinion and put the chart in and give a figure.

THE COURT: I gather there may be some modest inqui

MR. MANDEL: What are his differences with Peat, Marwick and what do they result from?

THE COURT: I will let this go in. If you see any basis of striking out --

MR. GRUTMAN: I was just thinking of saving some time --

THE COURT: I don't think what's going to be asked is necessary. Mr. Shaw wants to put a reservation on me as the Court --

MR. GRUTMAN: I don't want any reservations. Mr. Mandel, you will put this document in --

MR. MANDEL: I will ask him a few questions as to what discrepancies he found -- it will take me ten minutes.

MR. GRUTMAN: You mean you are going to take our cross examination away?

MR. MANDEL: You mean you want to cross examine him?

MR. GRUTMAN: Yes.

(In open court)

xxx (Defendant's Exhibit VVVV received in evidence.)

BY MR. MANDEL:

Q Mr. Lautherbach, have I asked you to state the number which is your opinion of Charles Gross' proper capital account?

A At a certain date.

Q As of December 31, 1970.

A Yes. I believe it to be $336,921 plus the value of certain warranties held for Mr. Gross by the company Newburger, Loeb and Company.

Q What were those warranties?

A 3094 warranties to purchase the common stock of Computer Soft Wire Systems, Inc., 1650 warranties to purchase the stock of Geon Industries, Inc., and 2578 warranties to purchase the stock of Host Enterprises, Inc.

Q In your opinion, was Charles Gross' capital the same on February 11, 1971?

MR. SHAW: Objection. But thus far I know the basis for his opinion as of December 31, 1970, but I don't believe there is any support in the record that he has any for, examined any records for the period almost six weeks later.

THE COURT: I don't see any foundation on the prese record for that. But let's see if one can be established. I sustain that objection.

Q Do you recall the last question, Mr. Lauterbach?

A Yes.

Q In your opinion, was Mr. Gross' capital the same on February 11, 1971?

MR. GRUTMAN: That is objected to.

THE COURT: Before you get there --

Q What is the basis for your opinion as to his capita on February 11, 1971?

MR. GRUTMAN: That is objected to on the basis that there is no foundation that he could have no basis for that.

MR. MANDEL: I withdraw that, your Honor. I think the contract itself will establish that.

MR. GRUTMAN: Now, Judge --

MR. MANDEL: I withdraw the question.

Q Can you explain briefly, Mr. Lauterbach, the differences which you took between the calculations of Mr. Gross' capital by Peat, Marwick as shown in their work papers and in their final report, and in your opinion as shown in VVVV

MR. SHAW: Your Honor, we permitted this to go in on the purpose of saving time but it seems to me that all th differences as I understand it are set forth and are summarize in the schedule which can be read to the jury and we can save time this way. Unless there is another difference, then I object.

THE COURT: No, overruled. You may answer.

A The computation of the capital account for Mr. Gros at these dates is composed of three basic items. His capital account at the beginning of the year plus any contributions made by him plus interest and various adjustments, to which I am in agreement with the determination of Peat, Marwick and Mitchell. I might say the determination is made by the compar The auditors' report said in effect they are in agreement with it. The determination was not made by Peat, Marwick, Mitchell and Company. That figure is $897,603.

Q Go on.

A From that there must be subtracted Mr. Gross' share of certain losses incurred by the partnership described as bac office losses with which determination I am in agreement because Mr. Gross had previously agreed to that portion. That is $235,518. There must further be subtracted from Mr. Gross' share of the unrealized losses that the firm had on their exchange memberships. That number is determined by the firm and agreed to by Peat, Marwick, Mitchell and Company; is also agreed to by me. That is $103,528. The third item which must be subtracted is Mr. Gross' share of the 1970 operating losses. I am in disagreement with the amount determined by the company and the other auditors. I find the number to be $220,636. Or the total loss of the company as $1,551,709 as opposed to $3,017,078. Mr. Gross' share of the loss in my opinion should be $220,636. So that from his beginni capital account there should be subtracted a total of $559,682 which would leave him with a capital account of $337,921 on December 31, 1970, plus the value of the three securities I described.

MR. MANDEL: Your witness.

CROSS EXAMINATION

BY MR. SHAW:

Q Mr. Lauterbach, do I understand you correctly that there is just one way that you in essence disagree with Peat, Marwick in their computation of the capital account, and that is that whereas they compute a certain figure as being Mr. Gross' share of the losses for the year 1970, you compute a different figure?

A No, there are two places. They omit from the calculation the value of the three securities I described.

Q I'm sorry. Excluding the value of the securities.

THE COURT: Mr. Lauterbach, did you give a figure for that?

THE WITNESS: No, I was unable to determine it at that given time. It was not a matter of the records I examined that I was unable to determine the value of those securities.

Q Excluding the three securities, really they are thr warranties, aren't they?

A Warranties are securities, yes.

Q Excluding the warranties, is there basically one area in which you disagree with Peat, Marwick?

A Yes.

Q And that is the issue of what portion of the 1970 loss was Mr. Gross' share?

A No. That is not the area of disagreement. The portion of the loss is in agreement. It is the total amount of the loss to which Mr. Gross' share or percentage must be applied.

Q In other words, it is your view that after a certai period of time the losses that Mr. Gross must share stop, whereas Peat, Marwick is in disagreement with you?

A No, sir. That is not the difference.

Q Is your disagreement with Peat, Marwick the fact that you compute the loss for 1970 to be approximately a millio five, whereas Peat, Marwick computes the loss for 1970 to be approximately three million dollars?

A It is the loss in which Mr. Gross is to share.

Q Is there any disagreement between you and Peat, Marwick with respect to what the size of the loss of Newburger, Loeb for the year 1970 was?

A Yes.

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Q Is Peat, Marwick's view that the size of the loss, the amount of the loss, is approximately three million dollars?

A Yes. I must --

Q And is your view -- just a second -- that the size of the loss is approximately $1,500,000?

A No, sir.

Q What is your view as to what the loss of Newburger, Loeb during the year 1970 was?

A I did not attempt to determine that number.

Q And is it your view that where Peat, Marwick concludes that the loss for the year 1970 was approximately three million dollars, that that is incorrect?

A I did not attempt to compute the company's loss for 1970.

Q Is there any difference given to the way Peat, Marwick computes Mr. Gross' capital account and the way Peat, Marwick computed all the other partners' capital account in Exhibit I?

A I did not pay specific attention as to how they computed other partners' capital accounts.

Q Let me just get this clear: does the computation which you have made of Mr. Gross, according to you, correct capital account, have anything to do with the fact that Mr. Gross withdrew as a partner somewhere in the year 1970 before the full year was out?

A Yes, sir.

Q Based upon that, is it your view that Mr. Gross was only responsible for a portion of the loss for the year 1970?

A Yes.

Q In reaching your conclusion, did you rely upon the worksheets of Peat, Marwick?

A In part, yes.

Q In addition to the worksheets, did you rely upon the financial statement in front of you?

A In part, yes.

Q And in reaching your conclusion, did you rely upon conversations with Mr. Mandel and with Mr. Gross?

A No, sir.

Q In reaching your conclusion, did you review any agreement between Mr. Gross and the partners of Newburger, Loeb?

A Do you mean the partnership agreement?

Q Yes.

A Yes, sir.

Q In reaching your conclusion did you take into consideration a provision, if any, in the partnership agreement to the effect that even after a partner withdraws his capital shall remain at the risk of the business for a period twelve months after he has withdrawn?

A Yes.

Q And was it your view that even though Mr. Gross had withdrawn somewhere in the year 1970 as of the date of his withdrawal losses that might have been sustained could not be charged against him?

A Will you please repeat the question?

MR. SHAW: Could I have it read back?

(Question read)

A No, sir, that was not my conclusion.

Q In reaching your conclusion, did you rely and did you accept the fact that even though he had withdrawn, losses for a period of twelve months could be charged against and used to diminish his capital account?

A Yes. I believe that losses could have been used, yes.

Q Even losses after January 1, 1971?

A I do not believe so.

Q Well, the date of his withdrawal, do you know what date that was?

A I believe it is in September, 1970. The effective date of his withdrawal.

Q So Mr. Gross would still be responsible and it coul be charged against his capital account, losses until September of 1971, correct?

A No, I did not understand that from the agreement I reviewed.

Q If you understood that and if that were, in fact, the case, that for a period of twelve months after September, 1970, Mr. Gross just as well as all of the other general partners of Newburger, Loeb were responsible for the losses, would your conclusion regarding the capital account as of December 31, 1970, be in any respect changed?

MR. MANDEL: I object, your Honor, because this question is without foundation and contradicts the agreement. Their expert, Mr. Brout, said very plainly what the agreement says, that losses are calculated on an allocation formula based on volume, to the end of the calendar year. Your Honor probably remembers that.

THE COURT: I do.

MR. SHAW: Your Honor, there is a matter of interpretation of the agreement and I respectfully differ with that.

THE COURT: Which witness testified to that?

MR. MANDEL: Mr. Brout, their expert accountant.

THE COURT: I remember that testimony. I will sustain the objection.

Q Before reaching the conclusion that you did with respect to Mr. Gross' capital account, did you exclude any losses that the partnership sustained or incurred subsequen to September, 1970?

A Yes.

Q That was because he had withdrawn as of a certain date, correct?

A No.

Q Why did you exclude the losses after September, 1970?

A Because of the documents that I examined and what I found in the documents I examined.

Q Basically the partnership agreement?

A No. Not that alone, sir.

Q The work papers?

A The work papers of the accounting firm and the work papers of Newburger, Loeb and Company which were given to the accounting firm as part of their engagement.

Q Did you exclude any of those losses because of your view that the losses had not, in fact, occurred?

A No, sir. Not because they had not -- not because they were not incurred.

Q But you excluded the losses because in your opinion they were not chargeable against Mr. Gross' capital account?

A After reviewing the records of the company and the company's statements.

Q Is it correct that all of the areas of disagreement between you and Peat, Marwick are reflected in Exhibit VVVV?

A Yes, sir. May I add one thing. These are not disagreements between Peat, Marwick and myself. These are disagreements between myself and the computation by the compan of what Mr. Gross' capital account was.

Q So just to make this clear, you are referring to a schedule attached to Exhibit VVVV called Exhibit C, correct?

A May I see a copy of it, please?

(Pause)

A Yes.

Q And the schedule starts out with the caption "Atlas Realty Settlement $411,655."

A Yes.

Q You don't dispute that Newburger, Loeb had as a loss $411,655 in relation to Atlas Realty Settlement, do you?

A The explanation for that is on Schedule C1, the next page.

Q You don't dispute there was a loss, do you?

A I don't know whether there was a loss or not.

Q But you say that it should not be charged against Mr. Gross' capital account?

A Yes, sir.

Q And that is true with respect to these fifteen item here?

A No, they are not all of the same nature.

Q In one way or another you say this is not a loss or it is not something that should be charged against him?

A Yes.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q Is this the first time you have ever testified in court?

A No, sir.

Q Have you ever testified before on behalf of Mr. Mandel?

A No, sir.

Q Have you had any connection with Mr. Gross?

A Yes, sir.

Q For how long have you known Mr. Gross?

A Since approximately 1959 or '60.

Q Then do I understand that in addition to being a partner in the Rainess account firm you were also in the Simonson, Peyser and Citrin accounting firm who were Mr. Gross' accountants for a good number of years?

A Yes, sir.

Q Are you familiar with the firm of Peat, Marwick,

Mitchell?

A Familiar, to a reasonable degree, to some degree.

Q Have you ever had occasion to examine audited reports which they have prepared, before?

A I have had occasion to examine reports that they were in the process of preparing.

Q Have you ever disagreed with them before?

A Yes, sir.

Q In court?

A No, sir.

Q Before coming to testify today, did you discuss the substance of your testimony with Mr. Mandel or Mr. Gross or anybody associated with them?

A I discussed what appears in these exhibits. They asked me questions, whether I could explain what it is that was written here.

Q Were you told anything concerning the testimony that had been given in this case by another accountant named Allan Brout account firm of Brout and Company?

A No, sir.

Q When you went over the work records of Peat, Marwick, do we understand correctly that all you reviewed was the agreement which Peat, Marwick made in reaching the capital account of Mr. Gross by looking at the way in which they had treated Mr. Gross, and not comparing it with any of the other partners?

A I looked at all the work papers that Peat, Marwick had available relating to their engagement that led them to come to this opinion, which included original documents submitted to them by Newburger, Loeb and Company.

Q Did those documents that were made available to you include the documents which showed how Peat, Marwick in preparing the audited statement which they did likewise made the determination for all of the other partners of Newbur Loeb?

A They may have. I couldn't say for certain. I wasn't interested in the other partners.

Q So, therefore, you cannot tell us that in the compu tation which was made by Peat, Marwick and Mitchell of Mr. Gross' capital account the treatment of Mr. Gross was in any way discriminatory or different by way of an effort from what was applied to the computation of the capital accounts of all the other partners whose capital accounts were computed in that statement?

A If I come to a conclusion that Mr. Gross' capital account is different from what they said it was, then someone else might likewise be different.

Q But your opinin is that it would be different?

A That's right.

A I don't know that.

Q Is there any indication inthe audit that that was done?

A I have no way of knowing that.

Q Is there any indication by the company that that was done?

A I have no way of knowing that.

Q When you described that Mr. Gross' share of the warranties were not taken into account, that assumed on your part, as I understand it, and you were told, that he was entitled to the warranties?

A I was given a copy of a document signed by another partner in the firm indicating that the warranties were the personal property of Mr. Gross. I have a copy of the letter here and so I used that in the calculations here but I didn't know what the value of the warranties was in dollars and cents.

Q And as of that date you said you couldn't ascertain a value?

A I made no effort to determine a value because the documents that were given to me indicated that they specifically in kind were his property and so I didn't think the determination of value was pertinent. They just belonged to him as securities.

bringing an arbitration proceeding before the New York Stock Exchange against the partnership to vindicate the grievances that you felt?

A I received a summons and complaint from the corporation -- let me finish, please.

Q I haven't said anything.

A I received a summons and complaint from the corporation and I was advised by counsel that the proper place for my claims was in response to the summons and complaint that I received. I, therefore, never considered any other action.

Q Lastly, I understand that the partnership return, that is, the tax return, for 1970 was prepared by Milton Rindler and Company based on the Peat Marwick financials, is that correct?

A That is my knowledge. He sent it to my accountant.

Q You have told us yesterday that you received a tax refund in the amount of $208,000?

A Approximately that amount.

Q Is the refund that you received from the United States based --

A And New York State.

Q -- and New York State --

A And New York City.

Q -- based upon the tax return which was prepared by

Milton Rindler and Company using the figures prepared by Peat, Marwick and Mitchell as to the losses that were attributab to you?

A Yes. But, you see, Mr. Grutman --

Q Thank you very much.

A That is apparently an open question. That tax return is still being examined --

MR. GRUTMAN: I move to strike everything after "yes."

THE COURT: All right. Strike everything after "yes."

Anything further?

MR. MANDEL: I have one question.

CROSS EXAMINATION

BY MR. MANDEL:

Q Will you explain about the use of the statement for your tax return? Would you explain your answer to Mr. Grutman' last question, please?

A Yes. We used the figures for the tax refund, the figures as presented to us by the partnership tax return, as a basis for a claim for tax refund. At least so I understand. I am not the accountant. However, that is still an open questi It is my knowledge that the Internal Revenue Department is planning to assess that Newburger Loeb partnership for the year 1974 --

MR. GURTMAN: One question, sir.

RECROSS EXAMINATION

BY MR. GRUTMAN:

Q You are aware, are you not, that by using the figures for the losses attributable to you which Peat Marwick stated, the tax refund which you received was higher than would have been the tax refund that you would have received had the figures of the losses chargeable to you as testified to yesterday by Mr. Lauterbach had been used. Are you aware of that?

A I am aware of the fact that --

Q Thank you.

A -- that when and -- I didn't say I am aware of that fact. I said I am aware of the fact that when and if the determination is made, I might owe some money.

Q You filed the tax return, and signed it, on which the return is based.

THE COURT: Yes.

A On the basis of the best information available at that time.

THE COURT: Anything further?

MR. GRUTMAN: No.

MR. MANDEL: Nothing further.

(Witness excused)

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MR. MANDEL: We have some deposition testimony and we have some documents to offer and then we will conclude our case. I apologize. I have to read depositions, but there is no other way to put some of this evidence in.

First Berkowitz.

Then Kayne and Muh and Newburger and some from Sloane.

Page 90, line 4 to page 91, line 10:

"MR. MANDEL: Would you mark these as Defendant's Exhibits 21, 22, 23 and 24 for identification and can we stipulate that the four exhibits are in evidence now as the letters to and from Rafkind, which are Defendant's AAAA through DDDD.

"Q Now, Mr. Berkowitz, I would like to refer to Exhibits 21 through 24 collectively as the Rafkind correspondence for shorthand.

"A Certainly.

"Q Now, Mr. Berkowitz, I would like to refer to Exhibits 21 through 24 collectively as the Rafkind correspondence, for shorthand.

"A Certainly.

"Q I take it that you signed and dictated the letters that are marked Exhibits 24 and 22, is that correct?

"A That's correct.

"Q Did you take the action embodied in your letters on your own initiative and responsibility or pursuant to instructions?

"A In my capacity as general counsel I did them on my own.

"Q You did not consult with the client in any way? Is that what you are telling me?

"A I believe that I may have had a discussion with Robert Newburger.

"Q And what was the nature of that discussion?

"MR. GELB: Objected to.

"Q Do you want to let your answer stand or do you want to change your answer that you did this on your own responsibility as counsel to the corporation?

"A The answer is I indicated to Mr. Neuburger the manner in which I would answer the letter.

"MR. GELB: He can't explore the conversation any further without treading on the privilege."

MR. GRUTMAN: I object to the colloquy.

MR. MANDEL: I think that is part of it, especially since no privilege existed.

MR. SHAW: Objection, your Honor.

MR. GRUTMAN: I object to Mr. Mandel's statement.

MR. MANDEL: The reason --

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THE COURT: Hold on a minute now.

MR. MANDEL: All right. Next is Muh.

THE COURT: Hold on a minute.

MR. SHAW: Are you finished?

MR. MANDEL: Yes.

(Pause)

THE COURT: I don't see what the problem is, Mr. Grutman.

MR. GRUTMAN: My objection is to Mr. Mandel's characterization of what he believes the colloquy is. No privilege has been asserted before this court. It is not necessary to read the comments of lawyers, which are not the testimony.

THE COURT: I see. All right. Go on to another deposition.

MR. MANDEL: Deposition of Robert Muh, taken on January 20, 1972. Page 141, line 22.

THE COURT: So the record is clear, Mr. Berkowitz's deposition was taken on December 22, 1971, I see.

MR. MANDEL: That's correct.

THE COURT: And he was under oath. And Mr. Muh's deposition was taken, this section, on January 20, 1972, and he was under oath at that time as well.

MR. MANDEL: Yes.

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THE COURT: Very good. Go ahead.

MR. MANDEL: Page 141, line 22 to 145, line 17:

"Q Okay. I want to ask you for the contents of the insight you received. Does the name Rakind mean anything to you?

"A I believe it is a member firm.

"Q Yes. Were you aware that at one time Mr. Gross was negotiating for employment with Rafkind and Company?

"A I was aware that sometime within the past year, I believe some form from the exchange was sent to our firm and referred to Mr. Gross and the Rafkind firm. I don't know whether that was for employment, partnership or what other capacity.

"Q And did you participate in any decision in connection with responding to that communication?

"A To the extent that Mr. Berkowitz, who was house counsel, was responsible for all such requests, he read to me.

"MR. GELB" -- who is a member of Finley Kumble, acting as attorney at that time for Mr. Muh -- "All right. Stop.

"Q I am not asking you to tell me what you said to Berkowitz or what Berkowitz said to you. I am merely asking you whether, first, you participated, whether you made a

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"decision.

"A As an officer, I had the opportunity, I suppose, to change the decision made by Mr. Berkowitz, and I didn't. So to that extent I approved it. Because the matter was handled by Mr. Berkowitz.

"Q He made the decision, as far as you were concerned?

"A Right, subject to having shown them to me and, I believe, Mr. Risher.

"Q Did you and Risher approve whatever it was that Berkowitz did?

"A We didn't disapprove of what he did."

Colloquy of counsel, which I skip.

"THE WITNESS: I am referring to a specific letter that Mr. Berkowitz showed me."

MR. MANDEL:

"Q Yes. I show you Defendant's Exhibit 21 for identification and ask whether you have seen that before."

21 is A and it is the first letter from Rafkind to Newburger, Loeb and Company, which is addressed to Mr. Robert L. Newburger and which requests clearance for Gross to be employed by Rafkind.

That was shown to Mr. Muh.

"I ask you whether you have seen that before.

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"A Yes.

"Q When did you see that?

"A When it was shown to me by Mr. Berkowitz, probably in February of '71.

"A Did you see this before Mr. Berkowitz responded?

"A No, I don't believe I did.

"Q Do you think he showed it to you after he responded?

"A When you say 'responded,' I don't believe he had mailed the response. But Mr. Berkowitz received that letter, apparently, the way it is addressed, from Mr. Robert Neuburger, drew up the answer and then, prior to submitting the answer, showed it to me.

"Q I show you Defendant's Exhibit 22. Do you recognize that?"

And may we stipulate that 22 is BBBB, which is the response signed by Berkowitz on January 26, 1971. May we have that stipulated?

MR. GLATZER: Yes.

MR. MANDEL: Mr. Grutman, all counsel, can we have it stipulated?

MR. GRUTMAN: Yes.

MR. SHAW: I have no idea what the document is, your

jg/1f/23

Honor.

MR. GRUTMAN: This is the request --

MR. SHAW: I assume there is no problem.

MR. GRUTMAN: This is the request for employment as a registered representative.

MR. MANDEL: This is the response.

And I will not read that to the jury again at this time.

"Q I show you Defendant's Exhibit 22. Do you recognize that?

"A Yes.

"Q What is it?

"A It is the reply that Mr. Berkowitz sent to Mr. Rafkind with regard to the letter you showed me a month ago.

"Q Did you authorize Mr. Berkowitz to send that response to Rafkind?"

Colloquy and no answer.

"Q Did you authorize him to send that letter?"

Colloquy and no answer.

"Q Did you see Exhibit 22 before it was mailed?

"A I believe so.

"Q And you are refusing to answer my question as to whether you authorized Exhibit 22 to be mailed?"

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MR. SHAW: I have an objection, your Honor.

THE COURT: Yes. If there is no answer to that, I don't see any point in reading that, Mr. Mandel. Strike that out.

MR. MANDEL: All right.

THE COURT: The jury will disregard it.

MR. MANDEL: I now go, still with Muh, to page 91, line 16. I am going to page 96, line 7:

"A The only" --

MR. GRUTMAN: Where is the question?

MR. MANDEL: I think the answer will stand by itself. If you wish, I'll read the question.

MR. GRUTMAN: Please do.

MR. MANDEL:

"Q Were there any other letters or documents or ancillary agreements signed on December 30th from February 11th?

"A The only other specific documents that I can recall, as I say, there may be others that I just wasn't aware of, was an opinion of counsel.

"Q Which counsel rendered an opinion?

"A Finley Kumble.

"Q Do you have a copy of that?"

Let the record show that Mr. Gelb produced a copy

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and pointed out that the opinion letter was dated February 11, 1971, rather than December 30th.

And may we stipulate that that document marked as Exhibit 30 on the deposition is the Finley Kumble E, the opinion letter signed by Mr. Persky on the night of February 11th.

MR. ROTHMAN: It is also marked P43.

MR. GRUTMAN: I am willing to stipulate to that, your Honor, providing Mr. Mandel will stipulate that a copy of the opinion letter was sent to Mr. Mandel in February of 1971 by Mr. Per[illegible].

MR. MANDEL: That is untrue. I won't so stipulate.

THE COURT: And does that nullify your earlier --

MR. GRUTMAN: No, your Honor. I will stipulate to the truth of the fact that Mr. Persky's opinion letter of February 11, 1971, is the document referred to and I'll deal with the other problem later.

THE COURT: Very well.

MR. MANDEL:

"Q Do you recall any discussions concerning Mr. Persky's opinion letter, Exhibit 30 for identification?

"A There was discussion, not of his opinion letter but of the opinion letter in general.

"Q What was the nature of the discussion?"

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I'm skipping colloquy.

"A Just prior to the date of the opinion letter, that the opinion letter was supposed to be signed when we were informed by, I believe it was Mr. Freund of the Rosenman firm, that they wouldn't issue such an opinion letter. It had been our understanding throughout the negotiations, discussions and so forth that just in the normal course of events they had agreed they would issue such a letter and at the very last minute, for reasons that they didn't explain to me or to anyone else that I know of, they didn't issue such a letter. That was the basis for the discussion at all and the letter was then issued by Mr. Persky.

"Q Now, the Rosenman firm represented whom?

"A The general partnership and several of the individuals.

"Q And it had been all along the understanding that the Rosenman firm would issue its opinion that the partners who signed had the power to make this agreement on behalf of the partnership, is that correct?"

Skipping colloquy.

"A I don't know. I had always assumed it was just, frankly, a legal formality and they were going to issue an opinion letter. I never got concerned with what it was specifically addressing. And, as I say, when they surprised

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"everyone at the very last moment by saying they wouldn't write such an opinion letter, it was written by another firm.

"Q That was Mr. Burak who said that, was it not?

"A I believe so.

"Q Were you present when he said that?

"A I think so.

"Q Now, in fact, he said that he couldn't issue such a letter, did he not?

"A Whether he said he couldn't or wouldn't, I don't recall.

"Q You don't recall? Do you recall whether he said that after research it was his opinion that under Section 98 of the partnership law this couldn't be done without the consent of all the limited partners?"

Skipping colloquy.

"A To me, he didn't express that legal opinion to me.

"Q Did you hear him say anything like that?

"A No, I didn't.

"Q So, as far as you know, it was just, and you didn't hear why he wouldn't do it and you never asked anybody, is that correct?

"A That's correct. I wasn't particularly con-

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"cerned. I didn't see any reason to be. I asked counsel what the implications were.

"Q What counsel?

"A My counsel.

"Q Mr. Persky?

"A Correct.

"Q Did you ask Mr. Persky to issue such a letter instead of the Rosenman firm?

"A I personally didn't, though I am pretty sure somebody from the corporation did.

"Q Did you hear anybody ask Mr. Persky to issue such a letter?"

Colloquy skipped.

"A I have to only assume it took place. I didn't hear it.

"Q Now, before February 11th, had anybody ever said in your presence that this agreement couldn't be legally made, that is, that the junior partners and the limited partners who made the agreement couldn't legally do so, binding the partnership over the opposition or without the consent of Mr. Gross or without the consent of all the limited partners?

"A I believe you once told me that.

"Q Phillip Mandel told you that?

"A Yes.

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"Q Once or more than once?

"A Once specifically, as I recall, one meeting. You may have stated it several times at that meeting.

"Q You referred to a meeting that took place when?

"A I will ask for your assistance. It was at your office, as to the exact date.

"Q A meeting, the one meeting at the office of Golden, Wienshienk & Mandel?

"A Correct."

MR. SHAW: Could the record indicate that that was a reading from the deposition taken on January 21, 1972?

THE COURT: I thought we announced that before we began.

MR. SHAW: I thought it hadn't been.

THE COURT: I saw to it that it was.

MR. MANDEL: I go to page 126, line 17 of the Muh deposition of the same day.

MR. GRUTMAN: How far are you going?

MR. MANDEL: To 131, line 9:

"Q Now, I asked you yesterday whether there had been discussions about what would be done with the capital of Gross and Donoghue and Bleich and you didn't seem to remember such discussions, is that right?

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"A Correct.

"Q And we will try again to refresh your recollection a little bit. Did you ever have a discussion with anybody about what would be the corporation's obligation, if any, to screen Donoghue if the deal went through without her consent?

"A Probably so. I don't remember specific conversations. I remember Jeanne and Mabel, we had thought until very close to signing, would go along.

"With respect to the two ladies, and meaning them no harm, it was not a major subject of conversatio in issue at that point in time because we were still genuinely devoting a hundred plus percentage of our energy to getting the firms profitable again. Obviously the question must have come up and we must have, as businessmen, realized that there would be some questions as to the status of these individuals. But there was no firm decisions made one way or the other and no plan or anything elselaid out. This is what we will do with the corporation with reference to Mabel and Jeanne.

"Q Do you recall what the capital of Mabel was?

"A I believe they were both limited partners of $75,000 each. That is the figure that seems to stick in my mind.

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"Q And do you recall that you took over all the indebtedness the corporation assumed, all the indebtedness of the partnership, did it not?

"A Not all, no. It was an assumption of stated assets and liability which was certainly the vast majority of them.

"Q Did the corporation assume any liabilities for Mabel's capital?"

MR. GRUTMAN: Read the answer.

MR. MANDEL: There was colloquy of counsel. I think the answer is:

"I assume, if it did, it is in the documents, Mr. Mandel.

"Q You don't know?

"A I don't know how to answer that question. If you were assuming that there is a liability, probably yes.

"Q Well, what I'm really trying to find out, the two ladies together constituted $150,000 item.

"A That's correct.

"Q On the books. You were aware without any question that on the books of the partnership they had a $150,000 capital between them.

"A That they had contributed $150,000, definitel so.

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"Q And you were aware in the end that they didn't consent to the transactions between the partnership and the corporation.

"A Definitely so.

"Q And I'm just asking you to tell me whether that $150,000 item was ever the subject of discussion between you and anybody else.

"A As I stated, I am sure I discussed it with Mr. Risher, probably with some other people.

"Q All right. Can you recall anything at all about such discussion?"

Colloquy.

"A I certainly did discuss it with counsel.

"Q Which counsel?

"A The corporation's counsel.

"Q Mr. Persky?

"A Probably, yes.

"Q Before the deal was made or after?

"A Now remember, it was not until the very end that we knew for a fact that Jeanne and Mabel were not going to sign.

"Q Before February 11th or after?

"A Was the question did I discuss it before or did I know?

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"Q With Persky, before February 11th or after February 11th.

"A Probably before.

"Question" --

MR. GRUTMAN: I object to the next question, your Honor.

THE COURT: Where are we?

MR. GRUTMAN: Line 25 on page 129.

THE COURT: I'll sustain the objection.

MR. MANDEL: All right.

I skip to page 130, line 5.

MR. GRUTMAN: I object to the question. Line 5, your Honor, relates to a question in its form which you have sustained an objection to.

THE COURT: I'll permit the question if you take out that clause that begins "as" at the end of the first line.

MR. MANDEL: All right.

"Q Now, did you have these discussions with Persky in the presence of anybody else?

"A Quite possibly Mr. Risher, my partner.

"Q Anybody else?

"A Since I obviously don't recall specific conversations, I just have to say I don't remember discussing it in front of anybody else.

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"Q Now, you don't recall whether you had a private conversation with Risher about this?

"A I may have. Obviously I spoke with Mr. Risher, Mr. Berkowitz late in the negotiations, Mr. Kayne about the entire firm, about many, many subjects of interest to the firm, and I certainly can't say that I didn't discuss this.

"Q But you don't remember any such discussion?

"A No.

"Q Did there ever come a time when you met with Risher and the other officers of the corporation to make a decision as to what to do about Mabel and Jeanne?

"A A specific meeting for that purpose, no.

"Q Did you ever -- forget a specific meeting for the purpose. Did you ever have a meeting at which a decisi was made about them?

"A With counsel, yes.

"Q None without counsel?

"A A decision involving those people is one that I felt had to be done only in discussion with counsel."

Now I go to page 145, line 22, and I am going to page 147, line 12:

"Q Have you had any discussions with Mr. Kayne about proceedings between him and Mr. Gross in California?

"A Yes.

"Q What was the nature of those discussions, when did they take place, first?

"A I think we probably discussed it two or three times and I guess it was within the last six or eight months. Mr. Kayne would complain to me about the high cost of the legal fees that were involved.

"Q Did you have any other discussions with Mr. Kayne about his proceedings with Mr. Gross in California?

"A He informed me that there had been a ruling about a jurisdiction and that it had been, I don't even know the details, I haven't followed it closely, but there had been some ruling about the jurisdiction of the case that had been ruled in Mr. Gross' favor. But I have not been involved in any departments, I have not read the papers in the suit or anything.

"Q Did you know what Mr. Kayne's action against Gross in California was about?

"A I think so, but I'm not sure.

"Q What is your understanding?

"A My understanding was that it concerned the original inducement of Mr. Kayne and, I believe, Mr. Sloane to invest in the partnership in early 1970, and there was some question on their part on whether or not they had been given "the facts at the time of their investment.

"Q Has Kayne ever discussed with you the possibility that if Gross did something wrong he had a claim against the partnership for which the corporation would be liable?

"A No.

"Q That has not been discussed?

"A That has not been discussed.

"Q Now, did Kayne ever discuss with you the desirability of his bringing action against Gross in California before he did it?

"A He informed me that he was going to do it. But I really had no knowledge of any of those activities, and so I didn't at all participate in his decision to sue."

MR. GRUTMAN: I would like to read, your Honor.

MR. GLATZER: I would like to read the next four lines from where Mr. Mandel stopped.

THE COURT: Go ahead.

MR. GLATZER: Page 147. If you don't mind, I would like to go back over the previous question that you read and then pick up the next question and answer.

THE COURT: Go ahead.

MR. GLATZER:

"Q Did Kayne ever discuss with you the

"desirability of his bringing action against Gross in California before he did?

"A He informed me that he was going to do it, but I really had no knowledge of any of those activities and so I didn't at all participate in his decision to sue.

"Q It was not of concern to you as an officer of the corporation, as a stockholder?

"A It was a concern only because Fred Kayne is a personal friend but certainly not from a business standpoint."

MR. GRUTMAN: Your Honor, I should like to read from page 131 following where Mr. Mandel left off at line 8: beginni at line 9.

"Q Now, was the same thing true about Gross?

"A To a lesser extent.

"Q What do you mean by that?

"A I don't remember the date that you or someone first informed us that Mr. Gross was not going to sign the agreement, but it was conveyed to the group of us at the time that it was felt that not only would he not be a signer to the agreement but that he had certain privileges, having resigne from the partnership, that gave him rights. And I don't want to go into the legal side of it, but in effect it gave him the right to put in superior, in his claim, if he had any, to certai

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"other people. As a businessman, there was, very honestly, no doubt in my mind that this couldn't be the case, because if, in fact, by resigning in October or November as a general partner he had found a technique to free whatever capital he may or may not have in the firm, I as a consultant to the partnership would have had to recommend to every general partner resign, that all of them take out the limited capital that was remaining in the firm and to hell with the subordinated lenders and limited partners.

"So, because from the business standpoint I felt there was absolutely no validity to the position that I was told Mr. Gross was taking, that is, that by resigning he was entitled to cash, I just never got overly concerned with the question of how do we treat Mr. Gross' position. I viewed him as a general partner, entitled to the same treatment as general partners in the firm, and from the business standpoint I felt it was very clear-cut. Otherwise, the whole concept of what a partnership is, that general partners taking liability before the limited partners and subordinated lenders would have been totally abrogated.

"So, from a business standpoint it was very clear in my mind.

"Now, I've not studied that partnership agreement from a legal standpoint. You may tell me it says something other "than that. But, as a businessman, there was no doubt in my mind that just resigning from a technically bankrupt organization does not, should not provide you with a method for taking those remaining funds of a firm out ahead of other people who have a senior claim. So from the very beginning of my knowledge of Mr. Gross' position, his stated position, I felt that it really was a claim without merit from a business standpoint."

MR. MANDEL: I would like to go on.

THE COURT: Anybody else?

MR. GLATZER: One additional portion of Mr. Muh's testimony.

THE COURT: Go ahead.

MR. GLATZER: Reading --

MR. MANDEL: Why not let me continue from where --

THE COURT: No. Let's get the cross examination.

MR. GLATZER: Reading at page 36, line 19 through page 37, line 6:

"Q Did you do anything at all to investigate whether Mr. Gross had any rights in connection with the Geon warranties?"

MR. MANDEL: One moment, please. I am objecting to that on the ground that I am entitled to use any part of an adversary's deposition. The adversaries are not entitled to use any part of that deposition except as relates to or explains something which I have read.

THE COURT: Objection sustained.

MR. MANDEL: I go to page 133, line 5. I am picking up where Mr. Grutman left off.

"Q Let's put aside for the moment the question of whether Mr. Gross' claim had any priority over anybody else's. He had a capital position.

"A That's correct.

"Q You were aware of that.

"A Oh, yes.

"Q And you were aware before December 30th that he wouldn't consent to the transaction that was being made.

"A That's correct.

"Q And I think you were aware that his capital couldn't be wiped out by that transaction.

"A Probably so, yes."

I'll stop at that point.

MR. GRUTMAN: Then I'll read what follows where Mr. Mandel left off.

The following question by Mr. Mandel:

"Q So I'm asking you now whether, before December 30th, I am starting, that you had any discussion with anybody concerning what would or could or should be done "about Mr. Gross' capital if the deal were made.

"A Again, not referring to any specific conversation, and I'm not really sure if it was before or after December 30th, but around that period of time it had been the feeling of a number of us in the corporation that Mr. Gross would be entitled to receive preferred stock on the same basis as other general partners who also had positive capital positions. As I mentioned earlier, I guess yesterday, there had been a position taken by counsel for some of the limited partners, that it was their feeling that there was sufficient offsets or whatever the legal term is on behalf of the limited partners that perhaps Mr. Gross shouldn't receive anything because these offsets would have reduced his capital position.

My recollection is that in the interest of harmony and the saving of great legal expenses down the road, these people would have agreed to give Mr. Gross the same treatment the other general partners received."

Nothing further.

THE COURT: Anything further?

MR. MANDEL: That finishes Muh.

MR. SHAW: Your Honor, there is one additional segment that I would like to read. Page 135, line 23:

"Q So you feel he is entitled to preferred stock in an amount equal to his proper capital balance as "determined by accurate audit?

"A Correct.

"Q With all controversial questions determined one way or another?

"A Absolutely.

"Q Now, did you ever hear" --

MR. MANDEL: Just a moment, please.

THE COURT: Same objection as before?

MR. MANDEL: Yes.

THE COURT: Yes. Sustained.

MR. SHAW: All right. Stop right here.

MR. MANDEL: Next is Kayne.

Page 102, line 13, deposition of Kayne. This is in three volumes, your Honor, and we are in the first. This is a deposition taken on January 29, 1974. And the witness was sworn.

"Q Did there come a time when you made a formal statement to Newburger, Loeb and Company to the effect that you had been induced to join the firm, their firm, by misrepresentations and concealment of information?

"A Yes. There was a time that I read a prepared list of remarks, I believe, to the executive committee of Newburger Loeb.

"Q What was the approximate date or the exact

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"date of that?

"A I believe it was August 24, 1970.

"Q Were minutes taken of that meeting?

"A I believe so.

"Q Can you produce them?

"A I don't have them. I don't know where they are.

"Q Have they been made an exhibit in the arbitration?

"A No.

"Q Would you tell me everything that you know about whatever record was made of the prepared remarks or the minutes of the meeting?

"A I think there were minutes taken. I don't know where they are.

"Q You had certain prepared remarks?

"A Yes.

"Q Does that mean that you wrote out something in longhand?

"A I think the form of it was dictated and then typed.

"Q To whom did you dictate it?

"A I don't recall.

"Q Who typed it?

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"A Probably a secretary. I don't recall which secretary it was.

"Q Was it in the New York office of Newburger, Loeb and Company?

"A It was either in the office of Newburger, Loeb and Company in New York or it was in the office of Finley Kumble law firm.

"Q I think I may have leaped to an assumption in my prior question that you dictated the prepared remarks. Was that an assumption on my part correct or incorrect?

"A No. I think it was correct. I did dictate the prepared remarks and they were typed and then I believe I had the lawyer for the corporation, that is, special counsel to the corporation, review the remarks prior to my making them.

"Q Do you happen to recall the name of that person?

"A I was working with two people at the time, Robert Persky and Mike Bamberger. It was either one or both of them. I think it was Mike Bamberger.

"Q Is Mr. Bamberger connected with Finley Kumble?

"A I believe he is still a partner."

Skipping colloquy.

"Q Was Mr. Persky your attorney in August of 1970?

"A My personal attorney?

"Q Yes.

"A No.

"Q Was Mr. Bamberger your personal attorney in 1970?

"A No.

"Q Was Finley Kumble or any of its partners your personal attorney in August of 1970?

"A No.

"Q Was Mr. Persky the attorney of the partnership in August of 1970?

"A I believe the Finley Kumble law firm was retained as special counsel as a neutral outside party that has no affiliation with the corporation before that time.

"Q You mean the partnership?

"A The partnership before that time, but I don't know when that status was changed. I don't really know the difference between special counsel and counsel for the corporation in terms of legal language.

"Q Question" --

MR. GRUTMAN: There is an objection to the next questi

THE COURT: I don't have a transcript so you had better let me have a look at it.

MR. GRUTMAN: The objection was placed on the record at that time.

THE COURT: Where are we? Page 106, line what?

MR. GRUTMAN: The objection was interposed to the question at line 20.

(Pause)

MR. MANDEL: I believe all the rest of that is appropriate because there is no basis for the objection.

THE COURT: Let's see, Mr. Mandel. Let's not make any comments, please.

MR. MANDEL: All right.

(Pause)

THE COURT: Mr. Mandel, I take it that you want to get down to the substance that is set forth in lines 9 through 11 on page 107. Is that what you are aiming at?

MR. MANDEL: Yes.

THE COURT: I think somehow that should be permitted.

MR. GRUTMAN: That is already in evidence. He has already read that. There is no objection to that because Mr. Kayne directly testified that after it had been typed --

MR. MANDEL: I'll go on reading from there.

107, line 9:

"MR. ROTHMAN: He testified that Mr. Bamberger or

"Mr. Persky reviewed the comments.

"A That's correct."

Mr. Rothman asked a question:

"In the interest of expediency of getting this witness back to California, without in any way waiving the intent of privilege at this late date, just tell us without qualification who, if anybody, suggested to you that you read from prepared remarks of the August 24th meeting?

"THE WITNESS: That was my idea.

"Q Did you discuss that with anybody?

"A I believe I discussed it with Ned Frank.

"Q Did he suggest that you dictate it and get it done at the offices of Finley Kumble?

"A The meeting of the executive committee was held at Finley Kumble because they had a large conference room.

"Q You are testifying that it was typed there?

"A No.

"Q You know definitely it was typed there, do you not?

"A No, I don't.

"Q Was there any secretary at Newburger, Loeb and Company capable of taking that dictation and typing those statements?

"A Absolutely.

"Q What is yourbest recollection at this moment?

"A My recollection is that it was probably typed at the Finley Kumble firm.

"Q Did you discuss the contents with an attorney before you dictated the first draft?

"A No, I don't believe so."

Going to page 109, line 8, skipping colloquy.

"Q Do you recall whether you discussed the contents before the first draft with anybody?

"A I think I discussed them with Ned Frank, as I testified earlier.

"Q Did you discuss them with Persky?

"A I don't recall.

"Q Did you discuss them with Bamberger?

"A I don't recall."

Continuing: "I think I didn't until they edited them. My working relationship with both of these people was just beginning. They had just been retained, I think, a week or ten days before, and I was more comfortable with Ned Frank as a former U.S. Attorney and a lawyer and a fellow who I had short exposure to and who I respected. I respected his opinion on it and whether my idea to make a set of remarks was sound and sound business judgment and I went ahead and dictated the

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"first draft.

"Q Who was present at the editing of the prepared remarks?

"A As I said, I believe I was present and I believe either one of these two attorneys that I mentioned.

"Q Persky or Bamberger?

"A Yes.

"Q And also Frank?

"A I don't know if he was present or not. I don't recall."

And may we stipulate that the prepared remarks are Defendant's Exhibit S in evidence?

MR. GLATZER: Stipulated.

MR. GRUTMAN: So stipulated.

THE COURT: Very good.

MR. MANDEL: Now I go to 214, line 9, which is part of the deposition of Mr. Kayne on January 30, 1974. I am going to 215, line 24:

"Q I ask you to describe a conversation with Persky and Bamberger on or around August 23, 1970, in as far as it had to do with the legal rights to sue Gross and anybody else.

"A As I testified earlier, I dictated a set of prepared remarks that I had asked either Bamberger or Persky "to edit. I don't recall which one of the two of them did the editing. In my dictating of them and my discussions with them or him or both of them prior to them being edited, I told them that the essential thing, I had two thoughts in mind with respect to this dictation: one is that I uncovered a pile of worms here and that I wanted to make sure that it was on the record to the executive committee and in the minutes of the partnership, and secondly, I did not know what was going to happen afterwards and I did not know whether we were going to have any problems or what was going to happen, problems with individuals and partners and lawyers and things like that.

"But I said I wanted it clear that this document, by me going forth and acting as general partner, managing partner from August 24th and thereafter, that I was not waiving my right to legal remedies that I might have in any way.

"Q Is it your recollection that you originated the idea of disclaiming any waiver of your rights or that Persky or Bamberger originated that idea?

"A It is my recollection that I originated it.

"Q Did you disclose to the attorney Persky or Bamberger that orally that you intended to have a non-waiver statement?

"A I don't recall any specific provision of that

"I think the document represented by my prepared remarks accurately reflected what I wanted to accomplish about getting things on the record and reserving my right against any and all partners until such time as I felt that I wanted, you know, that it was important for me to look forward further."

I now go to page 140, line 18, and that is going back to the deposition of January 29th.

I am wrong about that. Page 140, line 18 was on January 30th.

I am going to 142, line 9.

"Q When you came to New York and when you became managing partner, was Paul Risher connected in any way with Newburger, Loeb and Company?

"A No.

"Q Was Robert Muh connected in any way with Newburger, Loeb and Company?

"A No.

"Q When you became managing partner, Robert Persky and his law firm were not connected in any way with Newburger, Loeb and Company?

"A That's correct.

"Q When you came to Newburger, Loeb and Company, was Fred Berkowitz -- do I have his name right?

"A No. Lawrence Berkowitz.

"Q He was not connected in any way with Newburge Loeb and Company?

"A That's correct.

"Q Is it fair to say that you introduced Risher and Muh to Newburger, Loeb and Company?

"A Yes.

"Q And you recommended that Risher and Muh be retained or hired by Newburger, Loeb and Company?

"A Yes.

"Q How did Persky happen to come to Newburger, Loeb and Company?

"A It was Risher and Muh that introduced me to Bob Persky.

"Q Neither Risher nor Muh had the power to retain Persky or Finley Kumble, and that was done by you, is that right?

"A Yes. That's correct. They did not have the power to retain.

"Q And you, in fact, retained Finley Kumble and Persky.

"A Yes."

I now go to page 150, line 25 and I am going to read to 152, line 25.

MR. SHAW: I am going to object to this on the ground of relevancy.

MR. GLATZER: I join in the objection.

THE COURT: I overrule that objection.

MR. MANDEL:

"Q You recently sold your 200,000 shares of voting stock in Newburger, Loeb and Company, Inc., for $400,000.

And I think the next colloquy should come in because it introduces a document which I intend to offer in evidence.

THE COURT: Proceed.

MR. MANDEL:

"MR. ROTH: I object to that question because we have an agreement here" --

MR. GRUTMAN: I object to counsel reading colloquy. If this document which you rule is properly to be admitted, I think it can be admitted, if it is, without reading.

THE COURT: Let me read the colloquy and I'll see.

(Pause)

MR. MANDEL: We don't need the colloquy if I may just offer the document.

THE COURT: All right. I take it there is no objectio to the offer of the document.

MR. SHAW: I continue the objection, your Honor.

THE COURT: On relevance. Sure.

MR. GLATZER: Same objection, your Honor.

MR. MANDEL: It is WWWW for identification.

THE COURT: On the grounds of relevancy the objection is overruled. I will take it.

(Defendant's Exhibit WWWW for identification was received in evidence.) xxx

MR. SHAW: I also object upon the ground of lack of connection because these facts occurred after the date involved in the alleged claim. It might be binding with respect to the people involved as an admission, but it is after the transfer agreement was over, it is after February 11, 1971.

THE COURT: It is clearly admissible against Mr. Kayne without any question.

MR. GRUTMAN: I rise on behalf of my client to object on the grounds that it is not binding in any way upon us. We were not participants to it, we didn't share in it, we were in no way involved in it.

MR. MANDEL: You only prepared the agreement.

MR. GRUTMAN: As scrivenies or as lawyers for having prepared the agreement. I don't believe that that is a legally cognizable basis for holding any lawyer and being bound by it.

THE COURT: I will admit it in evidence and it will be taken subject to some connection, if there is any connection I am not aware at this point of any specific connection, but I

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am aware that it is admissible against Mr. Kayne.

MR. GRUTMAN: I understand that. But I think we are coming to a point --

THE COURT: So I will admit it against Mr. Kayne.

MR. ESTERMAN: I join in that objection, your Honor.

THE COURT: Very good.

MR. SHAW: And that is on the basis of motive, your Honor.

THE COURT: Clearly. It is an item that the jury may consider on that issue.

MR. MANDEL: Your Honor, I am not going to read this now, but I think I should disclose on the record that under this agreement not only did Mr. Kayne sell shares but Mr. Berkowitz and Mr. Muh and that Mr. Risher was one of the purchasers, and Mr. Sloane sold shares, too.

MR. SHAW: Shares in the corporation a year later.

MR. MANDEL: Yes.

MR. GLATZER: I will stipulate that that statement is correct, without waiving our objection to the document.

THE COURT: Very good.

MR. GRUTMAN: Will you also stipulate that Finley Kumble didn't sell any shares and didn't participate in the proceeds of the sale?

MR. SHAW: And also, your Honor --

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THE COURT: We are offering an exhibit. Let's -- if you wanted such a stipulation, why don't the two of you discuss it and if you can reach an agreement and present it to me as an accomplished stipulation --

MR. GRUTMAN: Yes, sir.

MR. SHAW: I also believe that there has been a misstatement that Finley Kumble prepared the documents. My understanding is that other sets of attorneys, namely Schaffer Dale and the Friedman, Hoffman, Shereff firm prepared the documents, although Mr. Persky acted as escrow agent in that transaction. So Finley Kumble was not even the scrivener there.

THE COURT: I'm not admitting it on the basis of any such statement, which the jury is instructed to disregard at this point.

MR. MANDEL: And I should withdraw my statement because I only know what I see on the papers.

THE COURT: Very well. Go ahead.

MR. MANDEL: I am now going to page 152, line 19, and I ask about Defendant's Exhibit 88, which is WWWW just admitted, and I asked Mr. Kayne:

"Q Does Defendant's Exhibit 88 constitute documents in part under which you sold the 200,000 shares of voting stock of Newburger, Loeb and Company, Inc., acquired by you in connection with the transfer agreement?

"Yes.

"Q Am I right that you paid $10,000 for that 200,000 shares?"

I am going a little further than I had marked.

"A Yes.

"Q How much of a capital gain did you realize on the sale?"

MR. GLATZER: There is an objection on the record.

THE COURT: He rephrased the question. Go ahead.

MR. MANDEL:

"Q Do you know what a capital gain is?

"A Yes. I made 290,000 capital gain."

And can we stipulate that that is a reporter's error, it should be $390,000 capital gain.

MR. SHAW: I don't think it is a reporter's error.

MR. GLATZER: No, it is not. It is not a reporter's error.

THE COURT: You have no stipulation, Mr. Mandel. You will go ahead on the basis of the transcript.

MR. MANDEL: All right.

THE COURT: Very good.

MR. MANDEL: We now go to page 228, line 8:

"Q Are you aware that the plaintiff in this "case is Newburger, Loeb and Company, Inc.?

"A Yes.

"Q And that you were the chief executive officer of Newburger, Loeb and Company, Inc., when the instant action was commenced against Charles Gross and Mable Bleich.

"Did you say chief executive officer as being your title?

"A Yes.

"Q Did you approve and authorize the bringing of that action?

"A I believe the action was approved and coordinated and authorized by my fellow officers in New York, also the president of the company, Mr. Paul Risher."

I'm leaving out colloquy.

"Q My question was not who else may have approved or authorized the action but my question was did you approve and authorize the bringing of this instant action. I mean prior to the bringing of the action.

"A I don't recall.

"Q Did you know, prior to the bringing of this action, that such an action was going to be brought?

"A I don't recall."

That's all I have with Kayne.

MR. SHAW: On Kayne, your Honor, the excerpt read referred to an Exhibit 88 as being the document involved in the transaction a year later involving the purchase and sale of securities. I would like Mr. Mandel to produce Exhibit 88.

MR. MANDEL: It is WWWW (handing).

THE COURT: Why don't we take our midmorning recess at this point.

(Recess)

MR. GLATZER: Your Honor, I have one question and one answer from Mr. Kayne's deposition.

THE COURT: Go ahead.

MR. GLATZER: Page 151, line 24 through page 162, line 24.

"Q Did you or did you not recognize the possibility that there could be an enormous profit from your stock investment?

"A At the time I felt that the corporation was worthless. I gave no thought to the possibility of capital gain for my common stock. But what I did give thought to was that we, the officers of the corporation, had taken on the burden of a debt and that we had given a corporate promise that we were going to pay back in the future and I was concerned as to how the heck we were going to do that.

"Q Did you have no discussions in an attempt to get your common stock for nothing?

"A My discussions along this line were with both Muh, who I talked to for approximately once a week. He was in New York and I told Bob Muh that my underlying desire, as I testified to here, my total desire, was to see if they could put this thing together so that the partnership could not go bankrupt. He shared my view that the common stock was worthless. He further said that both he and Paul argued the point of trying not to put in the $10,000 with the New York Stock Exchange and that that was an adamant unwaivering rule of the New York Stock Exchange."

That's it.

THE COURT: Go ahead, Mr. Mandel.

MR. MANDEL: Your Honor, I now offer in evidence the point headings and the first paragraph of a joint brief submitted by the plaintiff and additional defendants on counterclaims on the summary judgment before Judge Ward.

MR. SHAW: I object to this, your Honor.

THE COURT: Let me see what it is you propose to offer and then I'll better understand the objection.

(Pause)

MR. MANDEL: It is a judicial admission and I think it is binding.

MR. GRUTMAN: It is a memorandum of law.

THE COURT: Isn't it so that a lawyer can make a statement with regard to my ability that binds a client?

MR. SHAW: That is possible, your Honor. But I think the rule with respect to those admissions being binding are limited to stipulations made by attorneys in pleadings and is not intended to cover a statement made in a memorandum of law, which is argumentative, and also particularly in this case it is prefaced by the word "arguendo."

THE COURT: Do you have this sheet of paper in front of you?

MR. SHAW: Yes.

THE COURT: How about the clause which beings "which" on line 3 of the text, starting, "The corporation which"? Isn't that a representation as to a fact?

MR. SHAW: Your Honor --

MR. GRUTMAN: Your Honor, I seem to recall from out of my own experience that stipulations between counsel in this court are required to be in writing. It is not a judicial admission.

THE COURT: This isn't a stipulation and it is in writing.

MR. SHAW: It is a concession based upon a condition which never occurred.

THE COURT: What condition?

MR. SHAW: That if the Court should do something.

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THE COURT: No. If the Court should remove an impediment, if a certain impediment did not exist, then somethi else exists.

MR. SHAW: Your Honor, it just seems to me that it is a position taken by an attorney. There is no proof that it is connected to any officer of the corporation. It is not an admission in the sense of having any active participation being established. It is argumentative. It is on page 142 of the memorandum of law.

THE COURT: All of those arguments really don't come down to the issue of whether three sets of attorneys for certain fifteen or so clients are empowered to make a statement regarding certain facts and certain alternatives.

I am initially predisposed to permit this in. I will reserve judgment over the lunch hour. But I am initially predisposed to permit this statement to go in in some fashion.

MR. GRUTMAN: Fine. May we take that up with you later?

THE COURT: Perhaps not in the precise language that is set forth here. But it seems to me that the underlying situation is something that has been a representation by lawyers on behalf of their clients that it is so.

MR. SHAW: May I just make one further comment, something for the Court to consider? That the representation

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is a conclusion rather than a statement of fact. Conclusions or opinions by attorneys in lawsuits are constantly known to differ and change as the proceedings go on and as they learn additional facts. It is not an admission of fact. It is a legal conclusion then made.

I think for that reason, another reason, it is not binding.

THE COURT: I understand what you are saying. All right.

MR. MANDEL: Your Honor, I have researched this thorough and you will find without question that this is a binding judicial admission and that the attorneys are agents for their clients empowered to make such statement.

THE COURT: As I have said, I lean that way. I will give it more mature consideration over the lunch hour.

MR. MANDEL: I now propose to read into evidence page 11 of an affidavit submitted by Mr. Risher to this Court, sworn to the fifth day of July, 1972.

MR. SHAW: No objection.

MR. MANDEL: There seems to be no objection, your Honor. I will read into the record to the jury page 11 from an affidavit of Paul Risher sworn to on the 5th day of July, 1972, and submitted to this Court.

Paragraph 15:

"As more fully set forth in the accompanying affidavi

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"of John Smith, our controller, the corporation is solvent and has in excess of seven and one-half million dollars in equity in subordinated capital. This amount is exclusive of the reserve for the claims of the Gross defendants which have been the subject of a reserve in the liability section of our balance sheet. This reserve has not been because of any acknowledgement of the liability but because of the insistence of the New York Stock Exchange that we err on the side of cauti in presenting our capital structure.

"16. It should be noted at this point that the statement made on behalf of the Gross defendants that everyone supposedly knew that the transfer from the partnership to the corporation could not go through if Gross, Bleich and Donoghue withdrew their capital is just not true. Even accepting their claims at face value without any offset, the new corporation from its inception would have been able to pay said amount out and would have been able to continue in business as would such payments would still have had adequate capital for busines purposes and to satisfy stock exchange requirements. Indeed, from its very inception the corporation set up a liability reserve on its books for this purpose.

"The reason Gross, Bleich and Donoghue were not paid their claims was not because that money was essential to the corporation but because of my good faith and belief that "they are not entitled to the amounts they claim."

That was signed by Paul Risher.

MR. SHAW: What date was that?

MR. ROTHMAN: July 5, 1972.

MR. SHAW: I want to read in another portion of that, your Honor.

THE COURT: If it bears upon what was read and amplifies it or explains something therein, you may. Otherwise not.

With regard to 142 of the joint answering memorandum, could counsel in some way turn this into an acceptably stipulat statement?

MR. SHAW: It is factually incorrect.

MR. GRUTMAN: I have a proposal that I could make to Mr. Mandel which would incorporate an additional proposition not covered on the document, which might be acceptable to him and I am prepared to discuss that with him at a suitable time.

THE COURT: We'll have to deal with our separate problems until we get a resolution.

Go ahead.

MR. SHAW: I'm reading from page 4 of the same affidavit, line 6, beginning with the words "There was."

MR. MANDEL: I object to that.

THE COURT: May I see the affidavit, please?

(Pause)

MR. MANDEL: How far do you propose to read?

MR. SHAW: That paragraph and the following paragraph.

MR. MANDEL: That is not related to the portion I read.

MR. SHAW: It deals with offsets and whether there were some due.

THE COURT: You read from page 11.

MR. MANDEL: I read page 11, which had to do with the corporation, starting at the top of the page and running to the bottom.

MR. SHAW: And it explains the reserve --

THE COURT: Mr. Shaw, hold on.

(Pause)

MR. SHAW: To page 5, right before the word "leasehold."

THE COURT: I sustain the objection to the reading of pages 4 and 5 in that they do not amplify or touch upon the subject matter Mr. Mandel read from that affidavit.

MR. SHAW: Thank you, your Honor.

MR. MANDEL: I have already read into the record my portion, I believe.

THE COURT: Yes.

MR. MANDEL: Now reading from the deposition of Andre

Newburger on June 8, 1972. The witness was sworn. I am going to start at page 8, line 23 and I am going to page 10, line 4:

"Q What happened on February 11, 1971, Mr. Newburger?

"A It was a closing of the reorganization procedures.

"Q And did you cease to be a junior partner of Newburger, Loeb and Company on that date?

"A Yes.

"Q And did you continue to be a junior partner of Newburger, Loeb and Company until February 11, 1971?

"A Yes.

"Q Was Newburger, Loeb and Company ever dissolve

"A I don't understand precisely what is meant in this instance by 'dissolved.'

"Q Was a certificate of dissolution ever filed for Newburger, Loeb and Company?

"A I don't know.

"Q Did you ever sign a certificate of dissolution?

"A I don't remember.

"Q On what date did Newburger, Loeb and Company cease to do business?

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"A I believe it to be February 12, 1971.

"Q Since February 12th of 1971, has Newburger, Loeb and Company maintained an office any place?

"A Newburger, Loeb and Company, the partnership really has no office."

I now go to page 10, line 16, and I will read to 11, line 5:

"Q Has Newburger, Loeb and Company had any bank accounts since February 12th of 1971?

"A Yes.

"Q With what banks?

"A The First National City Bank.

"Q And who have been the signatories on that account since February 12th of 1971?

"A I think myself" --

I'm skipping colloquy --

"Myself, Robert Newburger, Robert Stern. That is all I know."

I go to page 15, line 10, to 16, line 10:

"Q Are there any funds now in the partnership checking account you referred to earlier?

"A I think about fifteen cents.

"Q The account has not been closed out?

"A I don't know. I am not in custody of it.

"Q Who is in custody of the partnership checking account?

"A I believe the controller of the corporation.

"Q And who is that? By the corporation I take it you mean Newburger, Loeb and Company, Inc.

"A Yes.

"Q And who is the controller?

"A John Smith.

"Q And can you tell me how the controller of the corporation comes to be in custody of the partnership's checking account?

"A The account is merely a convenience account for the purpose of transferring the tax refund money under which the corporation is involved as a recipient of a large portion of these monies, and this to me is the reason why the corporation is the custodian of the papers and the record of this account.

"Q Who has possession and custody of the financial records and the books of account of the partnership?

"A The corporation."

I go now to page 31, line 1[illegible].

"Q Were you present at the closing on February 11, 1971?

"A Yes.

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"Q And you signed the transfer agreement on that date? Is that correct?

"A Yes.

"Q You signed it on behalf of the partnership, is that correct?

"A I don't recall whether I signed it or not on behalf of the partnership.

"Q You signed it on some basis, did you not?

"A Yes.

"Q I am going to walk around and show you a paper. Now I show you Exhibit 32 for identification. I am telling you it is Exhibit 32 for identification. I ask you to look at it and tell if you know what it is.

"A This looks like the basic agreement to transfer between the partnership and the corporation.

"Q That was executed on February 11th of 1971? Do you recognize the document now?

"A Yes.

"Q And do you recognize your signature on that document?

"A Yes.

"Q And do you now recall that you purported to sign that agreement on behalf of the partnership?

"A I signed the agreement.

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"Q On behalf of the partnership?

"A On behalf of Newburger, Loeb and Company, the partnership.

"Q Now, who authorized you to sign that agreement on behalf of the partnership?

"A Those other partners that were present.

"Q And that was the only authority you had to sign on behalf of the partnership, is that correct?

"A Yes.

"Q Now, when you signed on behalf of the partnership, you were aware, were you not, that Mabel Bleich and Jeanne Donoghue and Charles Gross were against discussion of this agreement and had refused to agree to it?

"A Yes.

"Q And how were you made aware of their objections?

"A I believe I was told by my attorney, Newburger Loeb's attorney.

"Q Who was Newburger Loeb's attorney on February 11, 1971?

"A Paul Burak.

"Q And how long had Mr. Burak been Newburger Loeb's attorney?

"A About a month.

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"Q And in what matters did Mr. Bu -- was Mr. Burak retained to represent the partnership?

"A In matters pertaining to the transfer.

"Q The transfer agreement, is that right?

"A The transfer and the transfer agreement.

"Q Now, do you recall that there was some question on February 11th with regard to Mr.Burak issuing an opinion to the effect that the discussion of the transfer agreement was properly authorized on behalf of the partnership?

"A Yes.

"Q Was there any conversation -- don't go into the conversation yet -- was there any conversation at that meeting in connection with Mr. Burak's opinion?

"A Yes.

"Q Who was present when that conversation took place?

"A Robert Persky, Paul Burak, and I was present for part of it and maybe some others whom I can't identify because I don't recollect clearly.

"Q And who did Persky represent at the closing, meaning on February 11, 1971?

"A He was representing the corporation.

"Q Now, what was the content of that conversati

"A The content was that Mr. Persky told Mr.

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"Burak something to the effect of, 'I thought you were going tc write an opinion.' Mr. Burak said, 'No. I told you I wasn't going to write an opinion,' and Mr. Persky said, 'All right. I will write the opinion.'

"Q Do you recall any further conversation?

"A No."

I concluded on page 35, line 7.

I now go to page 36, line 3:

"Q You answered, am I right, you and Persky and Burak and some others you don't remember, is that right?

"A I know that Persky was present, I know that Burak was present, and I know I was present or I would have no knowledge of it, and I don't know who else was present.

"Question" -- and I'm skipping to line 16:

"Q The conversation between Persky and Burak which you have recounted took place in the office of Persky's firm on the day of the closing, right?

"A Correct.

"Q Now, what I am asking is, was this conversation, aside from the main meeting, out of the hearing of some of the people or was it part of the main meeting in the hearing of anybody who happened to be listening at that moment?

"A The main meeting was not going on. It was during a lull in the meeting, when people were milling around.

"It was in a hallway outside the main meeting room.

"Q Okay. Now, did you ask anybody why Burak wouldn't sign the opinion?

"A No.

"Q Did you know in advance of the meeting that Burak wouldn't sign the opinion?

"A Yes.

"Q How did you learn in advance of the meeting that Burak wouldn't sign the opinion?

"A He told me that."

I closed at page 37, line 1. I now go to page 79, line 6.

"Q All right. We'll try it another way. Speaking specifically of you, under the terms of the transfer agreement you were forgiven a portion of your indebtedness of the partnership, were you not?

"A I was not required to pay all my deficit capital.

"Q And certain other partners similarly were released from any requirement to pay their full deficit capital, is that correct?

"A Yes.

"Q Which other partners received that benefit besides yourself?

"A I am sure Robert Stern was. I'm not sure of any others. I think Harold Richards was. I think John Settel was. I would have to refer to the entire closing documents to establish who else was.

"Q But at least you were then aware of these facts, were you not, on February 11th?"

And I skipped. I got no answer to that. I skip to page 81, line 5, skipping colloquy between counsel.

"Q On February 11, 1971, were you aware that the transfer agreement which you signed on behalf of the partnership released you from the obligation to pay your full deficit?

"A Yes.

"Q And were you likewise aware that the transfe agreement released certain of the other partners from paying their full deficits?

"A Yes.

"Q Now, were all of the partners to receive such release or releases released in the same dollar amount?

"A No.

"Q The dollar amount, then, was different, is that correct?

"A Yes.

"Q In your case what was the dollar amount of

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"your release?

"A About 125,000.

"Q In Mr. Richard's case, what was the approximate amount of the release?

"A I don't know.

"Q Do you know today, without reference to the documents, what the dollar amounts of the releases to other partners was?

"A No.

"Q Now, on February 11th and prior to February 11, 1971, was any calculation made by anybody of the approximate dollar amount of the releases of deficit being accorded to any of the partners, including yourself?

"A Well, I calculated the amount of the so-calle release to myself. I don't know of any others.

"Q When did you first calculate the amount of that release or releases?

"A I don't recall exactly when.

"Q Would it have been, to the best of your recollection, was it in September or October of 1970?

"A No.

"Q November or December of 1970?

"A More likely in January of 1971."

I go to page 85, line 17:

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"Q Now, who represented you in negotiating the amount of the forgiveness of deficit which you received?

"A Max Freund, if anyone. I think I did most of it myself. I think we all negotiated together.

"Q At what point?

"A During the period of negotiations. I thought it was in January. Maybe it was earlier. Really the whole sequence of events is so clouded and intense that my chronology isn't exact."

I will skip down to page 86, line 19.

"Q Will you name specifically the persons who took part in that negotiation?

"A I think Paul Risher, Robert Muh, myself, Robert Stern, Robert Newburger, maybe Paul Burak, maybe Max Freund."

I go to page 88, line 4:

"Q Can you recall where the idea came from that certain partners should be forgiven part of their deficits?

"A I can only recall for myself.

"Q All right.

"A (Continuing) That I didn't want to pay any more than was necessary.

"Q So what did you do about that?

"A I conveyed this to the people who were on "the other side, the incorporators.

"Q You mean Risher and Muh and Company?

"A Yes.

"Q And their attorney Persky?

"A Perhaps. I don't remember.

"Q And did you convey this orally or in writing?

"A Orally.

"Q And in substance, to the best of your ability what did you say to them?

"A I said in substance, 'I don't intend to pay all this money back.'

"Q And did anybody respond to you?

"A Yes.

"Q Who did?

"A I don't recall.

"Q And what was the nature of the response?

"A Well, 'We'll consider it.'

"Q And how about the other partners who didn't intend to pay all of their deficits back? Did they ever say anything about it in your hearing?

"A I don't recall any conversation in my hearing between them and others.

"Q Did you and the other partners who got forgiv

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"ever caucus amongst yourselves as to what forgiveness you should demand?

"A Not as to what particular forgiveness we should demand.

"Q What was the nature of your discussions amongst yourselves concerning forgiveness?

"A That we should get as much forgiveness as we could.

"Q And who were those partners who held that discussion besides you?

"A I am not positive. I think probably Bob Stern, Bob Newburger, Richards, maybe others. Maybe Richard Stern.

"Q How about Risher?

"A I don't believe so. Maybe Richards.

"Q And did you partners agree amongst yourselves

THE COURT: There is no answer to that, Mr. Mandel.

MR. MANDEL: All right. Yes, there was an answer.

THE COURT: All right. Go ahead. Unless you want these negative answers. Go ahead.

MR. MANDEL: I will skip down to page 90, line 17:

"Q You said that when you told the promoters of the new corporation that you didn't intend to pay all of your deficit they then responded something like, 'We'll consider it.'

"Is that right?

"Are you able to answer my question?

"A I don't understand the question. I thought I answered it some way back there. Are you just telling me what I said before?

"Q Before, you said they answered you, as I understood it, that they would take it under advisement. I am now asking you what happened at subsequent conversations after they took it under advisement.

"A They came up with a figure for reduction in the amount that would be paid back to the corporation from the deficit figures.

"Q When you say 'they,' whom do you mean?

"A Those who were in charge of the incorporatic

"Q Who would that be?

"A Muh, Persky, Berkowitz, Kayne, Risher, Sloan I can't think of any others right now.

"Q Which one actually transmitted to you the proposed figure for your forgiveness?

"A I don't recall exactly. At the time we were all sitting together. Probably Risher and Muh, Bob Stern, maybe Dick Stern, maybe myself, maybe Bob Newburger, and this was discussed.

"Q They announced the figure that they proposed "for every individual?

"A The proportion of the capital deficit which wouldn't have to be paid back.

"Q What proportion did they announce at that first meeting?

"A As I recall, it was about 25 percent.

"Q Was there any discussion pro and con of their proposal that the amount to be forgiven be 25 percent?

"A Some discussion. I don't recall exactly wha it was.

"Q Was there any bargaining back and forth about whether it should be larger or smaller?

"A Yes. I subsequently said I thought it shoul be larger.

"Q And what happened after that?

"A It didn't get any larger."

I'll stop there at page 93, line 5.

I go to page 102, line 8.

"Q And is it fair for me to say that you were trying to get as much forgiveness as you could for youself?

"A We all were.

"Q And is it fair to say that that was a very important part of the negotiation as far as you were concerned?

"A Yes.

"Q And is it fair for me to say that you made it completely clear that if you weren't satisfied on this point you would not sign the transfer agreement?

"A I don't know how clear I made it. I think this is an essential element of the negotiations."

And I stopped at 102, line 21. I go now to 119, line 24:

"Q We'll see if we can refresh your recollectio
When is the first time you heard of the Buckley claim?

"A Shortly after Westec stock was delisted from trading.

"Q And that would be about 1966?

"A Yes, right.

"Q And what did you hear in 1966 about the Buckley matter?

"A I heard there was a customer named Buckley introduced by Gross and Company that had a large position in Westec, which had no value as of that moment, and had a large amount, large debit balance, owing to our firm.

"Q And when was the first time that you heard that Buckley made a claim that his account had been churned?

"A I am not sure. Vaguely, sometime in Decembe

"Q Of 1970?

"A Of 1970.

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"Q And between 1966 and December of '70 you never heard that Buckley had any claim that anybody had done anything wrong in his account, is that right?

"A I don't think I heard it like that.

"Q Okay. Now, did there [illegible] a time when you authorized somebody to make a settlement with Buckley on behalf of the partnership?

"A I don't remember.

"Q As of today, do you know that a settlement agreement was reached between the partnership and Buckley?

"A Only from what I have read in your papers.

"Q Is it your best recollection that you didn't know of this settlement at the time it was made?

"A That's right.

"Q And you didn't authorize the settlement to be made with Buckley?

"A I don't remember authorizing it.

"Q In December of 1970, who had authority to make such a settlement on behalf of the partnership?

"A I don't know.

"Q Did you authorize anybody, in January of 1971, to commence an action in the Federal Court in Manhattan on behalf of the partnership against Charles Gross, Gross and Company, Mabel Bleich, based on an assignment of the Buckley claim to the partnership?

"A I don't recall doing that.

"Q In December of January of '70 -- excuse me. How about February of '71 -- did you authorize such an action to be brought on behalf of the partnership in that month?

"A I don't recall doing it.

"Q Do you recall hearing about such an action at all in December of '70 or January or February of '71?

"A No.

"Q Do you recall authorizing anybody to prepare papers for such an action on behalf of the partnership for you to be used in negotiations with Gross?

"A No.

"Q If I tell you that a complaint was prepared in the partnership name against Gross and dated in February of 1971 based on the Buckley churning claim, will you say that today is the first time you heard of that?

"A Yes.

"Q Now, did you ever make an investigation or hear anything about an investigation made by the partnership as to any validity of Buckley's claim of churning?

"A No.

"Q As of today do you have any opinion as to whether Buckley had a valid churning claim?

"A No.

"Q You have no opinion one way or the other, is that what your answer means?

"A I have no opinion.

"Q Do you know whether anybody ever investigate the Buckley claim on behalf of the partnership?

"A No. Excuse me. There was a negotiation with Buckley over the period of years from '66 on until the incident you are talking about. If you call that investigation of Buckley, that is investigation of Buckley.

"Q I was first asking about an investigation of Buckley's claim that he was churned.

"A Yes, I have no knowledge of that.

"Q You have no knowledge of that? Who handled the Buckley matter on behalf of the partnership?

"MR. ROTHMAN: From what period of time.

"MR. MANDEL: From 1966 on, so far as you know.

"A First Morris Neuburger handled it.

"Q Until what period?

"A Until the summer of '68. He fell ill and died. Then Leon Stern handled it.

"Q Until what time?

"A Until the Muh management assumed management, until I would say sometime around October or November of 1970.

"Q So do I understand you correctly that from October and November of 1970 until the settlement was made with Buckley that was a matter within the province of Risher and Muh, as far as you were concerned?

"A Yes.

"Q Is it your understanding that the settlement with Buckley was made on the authority of Risher and Muh?

"A Whatever settlement was made would have been made by them or, I should say, with their authority. I know only of the settlement through your papers.

"Q The executive committee of the partnership never approved that settlement, is that correct?

"A I don't recall approving it.

"Q It was never presented to the executive committee of the partnership, is that correct?

"A I don't recall.

"Q Did the general partners, acting outside of the executive committee, approve that settlement with Buckley

"A Not to my knowledge.

"Q When was the first time you learned of the Buckley settlement?

"A I read about it in your answer."

I stopped at page 125, line 10.

I now go back to page 65, line 15:

"Q In connection with the negotiations of the transfer agreement, did you make any effort to find out anything about Charles Gross' capital position and the effect upon him of the transfer agreement?

"A No.

"Q Did you recognize that you had any obligatio
as a partner in Newburger, Loeb and Company to protect Charles Gross' interests?

"Can you answer my question?

"A No."

I skip some colloquy.

"Q Do you now recognize that as a partner in Newburger, Loeb and Company you had an obligation to protect Charles Gross' interest in connection with your negotiations concerning the transfer agreement?

"A I am not sure. I don't know."

Nothing further.

MR. GRUTMAN: I have one question, page 125, line 15:

Continuing four lines after where Mr. Mandel left off:

"Q Before you signed the transfer agreement, did anybody call to your attention that Mr. Gross' attorneys said that and the attorney for Mabel Bleich and Jeanne Donoghue before Judge Babitt.

THE COURT: No, I thought I ruled against that.

MR. GRUTMAN: You did, your Honor. Yes, you did.

THE COURT: I ruled against that.

MR. MANDEL: Subject to these open matters, the defendants rest.

THE COURT: All right. We'll have certain matters of law to take up right after lunch.

How long do you think we will require for that?

MR. SHAW: I would think that it would take more than fifteen or twenty minutes.

THE COURT: It is a question of when I ask the jury to return after lunch.

MR. SHAW: I would think, because it is raining and I hate to suggest to the jury have a long lunch in the rain, but it would seem to me that 45 minutes would be at least required, in addition, for lunch. Perhaps counsel could take a brief lunch.

THE COURT: I have a luncheon appointment, unfortunatel

Ladies and gentlemen, 2:30.

(Luncheon Recess)

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AFTERNOON SESSION

2:00 p.m.

THE COURT: Mr. Mandel, I am going to admit almost all of what you asked on page 142, but not quite all.

I am going to admit the point heading except for the last --

MR. MANDEL: May I suggest this? Let me give you the exhibit itself.

THE COURT: Let's mark it.

MR. MANDEL: Mark it.

THE COURT: Triple Z.

xxx

(Plaintiff's Exhibit Triple Z for identification was marked.)

THE COURT: I am going to exclude the last clause of the point heading and the last two paragraphs at the bottom of the page.

We can put that on the record before the jury when they return.

MR. SHAW: Could you also consider excluding the number $75,000? That's what I object to, your Honor, because it is just wrong for that to have been said. It was an incorrect statement by counsel, at a point when they did not understand either the agreement or the accounting concepts.

MR. MANDEL: You can argue that.

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THE COURT: This is a statement by counsel on behalf of 20 defendants, three eminent law firms.

MR. GRUTMAN: Is your Honorgoing to charge the jury that as a proposition of law?

THE COURT: What is that?

MR. GRUTMAN: That but for the existence of the Buckley claims they are entitled to $150,000.

MR. MANDEL: Yes, I would think so.

MR. GRUTMAN: I didn't ask you, Mr. Mandel.

THE COURT: I will await hearing more on that tonight. But I am going to admit this as a piece of evidence.

MR. SHAW: The concept of a capital account, even of limited partners, is that it waxes and wanes depending upon how good business is. And that was the mistake here.

THE COURT: Well, that may be. We'll take that by way of explanation, if necessary.

MR. ESTERMAN: There were two points excluded from that, did you say?

THE COURT: Yes. I marked them physically on the exhibit in pencil. Mr. Mandel can show them to you.

MR. ESTERMAN: Fine.

THE COURT: Mr. Shaw, you are going to move to dismiss?

MR. SHAW: Yes, your Honor.

THE COURT: I await your motion.

MR. SHAW: Your Honor, in behalf of the defendant Aixala and the defendant Risher and plaintiff Newburger, Loeb and Company, Inc., I move to dismiss all of the counterclaims, the first, second, third, fourth and fifth, as well as the sixth, seventh, eighth and ninth counterclaims, upon the ground that in my opinion, first of all, no damage has been proven to have been sustained by Charles Gross, Mabel Bleich and Jeanne Donoghue.

Secondly, there is no proof of the existence of a conspiracy. In addition, there is no proof of the substantive torts alleged or any liability upon the part of Mr. Risher, Mr. Aixala or the corporation for any breach of Section 98 of the partnership law.

As I understood it, your Honor, the conspiracy in this case is a conspiracy for the purpose of injuring, in an unlawful way, Gross, Bleich and Donoghue through the commission of various substantive torts: the use of process, malicious prosecution, interfering with contractual relations, conceivably prima facie tort. I don't think it is necessary to label all these.

Insofar as Aixala and Risher and the corporation are concerned, I think that there is a failure of proof of any agreement upon their part to enter into such a conspiracy or to aid in the commission of any of those substantive tortious actions. And let me talk about it from tort to tort, if I may.

The prime tort that is referred to in this case, I think in order of magnitude, is the tort of abuse of process or malicious prosecution that involves bringing knowingly a baseless cause of action, and they refer not only to the Buckle cause of action, I believe they also refer to the cause of action brought in California and later removed for arbitration to the State of New York.

It seems to me that there is no proof that anybody knew that the cause of action had no merit whatsoever, and I'm referring to the California cause of action. There is no proof in the record of that. There is proof that there was a judgment eventually entered as a result of what the arbitrators decided in Gross' favor and not in the favor of Kayne and Sloane. But there has been no proof that that cause of action was brought with the belief, which the Court could assume or anybody could assume circumstantially, that it had no merit.

THE COURT: Mr. Shaw, let me stop you for a minute, because I know you are up to the eyeballs with all of these facts and we could probably argue law for an hour and a half rather than the 45 minutes you've asked for.

Am I not right that Sloane said, "If you don't ball with us we are going to litigate you into the ground?"

MR. SHAW: Assuming Sloane said that --

THE COURT: All right. Assuming he said that, why we have got to assume as proven whether it goes to the jury or not.

Thereafter within a matter of days this action is filed and subsequently the action is determined in Gross' favor. Now don't those three facts alone require my submitting it to the jury?

MR. SHAW: I would say no for two reasons.

THE COURT: Couldn't the jury find on the basis of those alone that this was an action that was filed pursuant to an expressed desire to cause trouble for Charlie Gross and that the action came to nothing?

MR. SHAW: The jury could find that, and if that was the only proof on the record I would think that as a matter of law neither the tort of malicious prosecution or of abuse of process or prima facie tort has been proven to exist, because I can make a threat to somebody I'm going to litigate you forever, I am going to try this case until we end up in the U.S. Supreme Court, but if I am of the belief that I have a meritoric cause of action, at least if I am not of the state of mind that this is a baseless cause of action, or unless it is proven that my sole and only motivation is to injure -- for example the Oliver Wendell Holmes decision where the man opens up a barber shop next to somebody else's barber shop, a perfectly legitimate thing to do. But it was held tortious because it was established that his only motive in doing it was to injure the person next door.

That is absent in this case, your Honor. All the threats, all the bringing of lawsuits, unless it is known to be without merit or unless it is solely for the purpose of injuring I think as a matter of law is not a tort.

THE COURT: All right.

MR. SHAW: Now let me just go further. With respect to the Buckley claim, this is a case that the Court knows even more about than the California action. The only thing we have in the California action is that a judgment was entered in one person's favor and against the other person. But insofar as the Buckley claim is concerned, your Honor, I think that based upon the evidence which the Court has heard, the testimony which has come in, certainly the conclusion cannot be reached that the people knew or should have known that the lawsuit was utterly without basis, and I'm using each word carefully. It is not a lawsuit which anybody in my humble opinion could conclude is utterly without basis. Nor is it a lawsuit which anybody could conclude is being brought solely for the purpose of injuring or harassing or causing trouble to a person.

I think that the courts are free for people to come into and bring lawsuits if the lawsuits have merit and they are not solely intended to injure, even though they may despise even though there may be great enmity between the plaintiff and the defendant.

Let me go a step further, if I may. Another area in addition to the bringing of the causes of action involved the violation or the fact that Section 98 of the partnership law was, in accordance with the decision of Judge Ward, not adhered to by virtue of this transfer agreement because the consent of the limited partners was not obtained.

So be it. There is no argument with respect to that, your Honor. But how can there be a conspiratorial liability upon the part of a person who is not a partner unless he knows that there is a violation or an illegal transfer under Section 98?

And here I think you get to the heart of what a civil conspiracy is and how it is different from a criminal conspirac

In the order of importance, where two people get together and agree to violate the penal laws and merely commit an overt act in furtherance of that, that's sufficiently inimical to the interest of society for it to be punishable, with nothing more.

But where you merely have a tort or you have a contra and two people get together and form an agreement or have a state of mind to do something, unless they know or are involved and carry it out, why should they be involved in the tort or the breach of contract or the violation of the Section 98?

Now, I think that is where it crumbles, because insofar as everybody who isn't a partner, who isn't a limited partner, who wasn't involved in the transfer agreement, for example Mr. Aixala, where is the proof that he knew that a violation of Section 98 was being committed? Where is the proof that he did anything?

All right. Your Honor, in addition to the bringing of the lawsuit there were threats to bring the lawsuits, there is the alleged reliance upon an opinion letter which Mr. Persky wrote. I submit that if you look at the requirement of knowledge upon the part of any person in this case, you are not going to be able to prove that Risher, for example, knew that Section 98 was being violated, that anybody knew that baseless lawsuits were being brought, and that's the essence of a conspiracy. There has to be an agreement.

I wonder if I can use a very prosaic type of illustration. Probably the simplest form of conspiracy case that we are familiar with is the standard narcotics conspiracy, where somebody has a bag and in the bag there is narcotics.

Now, he may be involved in that transfer with a man who drives a car, somebody who carries the bag for a small port of the route, somebody who actually receives it or somebody who gives it to him in the first place. There's got to be proof that they knew what was in the bag.

I think that there is no proof that anybody knew that lawsuits were baseless, that opinion letters were erroneous or any of these things occurred.

Now, I think you should also view the conspiracy from the point of view of the various alleged participants, and I would only like to talk about the people that I represent What proof of any connection between the conspiracy as alleged in the complaint and these persons has been established?

With respect to Mr. Aixala, your Honor, the only evidence that I recall in the record is that Mr. Aixala was instrumental in the recapitalization of Neuburger Loeb Corporation. He put up a certain amount of stock, the stock was security for a secured demand note, a secured demand note came in as capital for the corporation.

But there is no proof that he knew about a cause of action being brought in California, much less that it had no merit. There is no proof that he even heard about the Buckley claim, much less that Silverman thought that the claim was without merit. There is no proof that he even heard of Section 98 of the partnership law. And the transaction becomes consummated on February 10, 1972.

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About a year later he signed an affidavit. The affidavit states that he was advised that the transaction was a perilous one economically. Subsequently, about two years go by, his deposition is taken, and he indicates that, in fact, he was advised that the transaction presented no risk.

Now, I think that is a fair summary of Aixala's involvment. I think it might also be established that he got his stock back, that he received interest. I'm not concerned with what is going to come out when Aixala takes the witness stand. But I see merely a situation where he was represented by an attorney with no proof of knowledge.

Mr. Mendel's argument seems to be that since knowledge is imputed from the attorney to a client, the client is a member of the conspiracy if it is proven that the attorney did certain things.

I think that the law of conspiracy, even in a criminal case, would not support that, and this is a civil case.

Now, insofar as Mr. Risher is concerned, your Honor, there is no proof that Mr. Risher knew or should have known that the action brought by Kayne and Sloane had no merit. There is not even any proof that Kayne and Sloane believed that action had no merit. There is no proof that Mr. Risher knew or believed that Section 98 was an impediment to the transaction. There is nothing from which you could infer that.

He is not presumed to know the law. There is no proof that he is an attorney.

There is no proof that he was in any way involved, that I can think of, in doing anything illegal or wrongful in any way that traces his activity, either up to February 10, 1971, when the conspiracy is supposed to have achieved its purpose, or even after.

Let me say one further thing with respect to damages, if I may. I think that there has been a total failure of proof of damages, for this reason, your Honor. I think that under the partnership law that a person having an interest in a partnership, merely if it is established that the books as of a certain date say that is your capital account, is not entitled to that sum of money. The capital account is not a bank account. You can't go to the partnership and withdraw the sum of money. Nor can you say that if the entire partnership and all of its assets are converted the capital account represents the way you have been damaged, because everybody, I think, must take into consideration that the capital account is a bookkeeping figure which is used to attempt to reflect what the value of the business is and what a certain person's share is as of a certain period of time.

There is no proof that Mr. Gross' interest, either on the date of the alleged wrongful transfer, was worth the sum set forth in the capital account or that Bleich and Donoghue, who were limited partners to the extent of $75,000 --

THE COURT: How about the accounting proof of yesterday? Doesn't that take him to the jury on that issue?

MR. SHAW: I think the only thing the accounting proof does, your Honor, is prove that the capital account was a certain sum. That is like saying stock in a corporation is a certain number of shares. The value of that is something else. This is why Mr. Mandel wanted to get in the document that he has just gotten in, which says $75,000. And herein I believe previous counsel may have made a mistake. Because I think that one additional step is required in the chain of proof, and that is to establish that if there was an accounting between the partners --

THE COURT: Even beyond that. If he had a liquidation, didn't he say that it would be enough to go to the limited partners or did he say only enough to the subordinate lenders.

That is based on a study of the financial information. This gentleman yesterday made a study of the financial information and said there was enough to get to Charles Gross.

MR. SHAW: I think that he said that there would be enough left over. But what Charles Gross would have been entitled to twelve months after the date that he withdrew, what Mabel Bleich would have been entitled to six months after the date they withdrew has not been established.

THE COURT: I don't think we need spend much time on that, because, frankly, that doesn't really move me, that point.

MR. SHAW: All right, your Honor. The key word, though, is accounting and that is in essence what I have always felt from the day I first appeared before you in this case should be done. Ordinarily when a partnership is dissolved and there is a dispute regarding the capital account, the partners get together and draw up the items of their account and any areas where they can't agree are resolved, a balance is struck and that's what the person is entitled to, not what the capital account says.

THE COURT: No. But I think the jury on this case is not being asked to do that. The jury is being asked to determine, given the facts, would they support a finding that three people had been ridden over roughshod and damaged, and if so to what extent. That is the question that Mr. Mandel poses.

MR. SHAW: May I just make one statement? Because I know Mr. Grutman is raring to go.

I recall so vividly situations in conspiracy cases, and I had a good teacher in this area, where I was advised you can't paint it with a broad brush. You have to see what proof exists with respect to each person and you have to see what the conspiracy is.

I don't think that you can simply throw this case into a pot of they were trying to do bad to them because they were trying to do bad to us. I think conspiracy requires you to define what the object of the conspiracy was --

THE COURT: I don't quarrel with any of that.

MR. SHAW: And you have to have connection with the people to it and that's where I think that we are lacking in it.

THE COURT: All right.

MR. GRUTMAN: Your Honor, I join in the motion made by Mr. Shaw previously set forth by him on behalf of my client Finley Kumble and I make the motion which I do now, your Honor, not in a perfunctory way, and I do it in an endeavor to help the Court shape what is an unwieldy mass of evidence and a wide variety of claims that have been asserted by Mr. Mandel on behalf of his client.

I would say first on behalf of my client that it would be interesting for your Honor to consider a rather curious custom of the French law. In the French bar, whenever a lawyer represents a client accused of a capital crime, and the client is condemned and the execution is by guillotine, the losing lawyer must attend the execution.

And the reason for that, your Honor, is to encourage zeal and vigor and to deter lawyers from anything less than their wholehearted best on behalf of their client.

But the French law, in that curious custom, only executes the condemned, not his lawyer. And in this case, if your Honor please, what Mr. Gross through Mr. Mandel has done is to contrive what I believe I can respectfully say to this Court is a totally fake case against Finley Kumble.

There are seven specific claims made about the activities of Robert Persky and, through Robert Persky, that reach into the only pocket that could possibly satisfy the rapacious greed of Mr. Gross, and that is Finley Kumble, and I'll itemize these for you.

The first is the claim that the transfer agreement was in some way void, part of the conspiracy; secondly, that the opinion which was rendered by Robert Persky in connection with that transfer agreement at the open request and with complete acquiesence and at the insistence of the people who asked him in the unexpected circumstances to render it was likewise part of the same sham conspiracy; and third, that the transfer agreement was in some way part of the conspiracy to withhold the capital of the Gross, Bleich and Donoghue interests fourthly, that the settlement of the Buckley claim by Mr. Persky had a one hundred percent improved figure over what the prior counsel had been able to have offered in the more than a year that they represented Newburger Loeb, was likewise p of a conspiracy, that the assertion of the Buckley claim on behalf of Newburger Loeb by Finley Kumble was likewise somehow or other part of this same conspiracy.

Now, your Honor, there are two other points which I shall separately treat because I believe that they are so thin, that is, the Rafkind claim and the assertion of the bringing of lawsuits on behalf of clients, also alleged to be part of a conspiracy, are not legally cognizable and can result in no actionable liability against the law firm.

Section 772 of the restatement of torts, as embodied in the case of D and C Textile Corporation versus Rudin, reported at 41 Misc. 2nd, 916 and at 246 New York Sub 2nd 813, establish -- that insulating protection that the French law gives to the lawyers, namely that when a lawyer acts in a representative capacity on behalf of a client, even where he is wrong, there is no liability against the lawyer or the law firm. They are protected by a privilege.

And that is the law, and the law is set forth by Judge Silverman, a learned judge of the Supreme Court of the State of New York, and that law has square and direct applicati to those enumerated acts of so-called conspiracy because in every one of them Robert Persky and the firm Kumble Finley acte in a representative capacity. We did so in drafting the transfe agreement, we did so in rendering the opinion in connection with the transfer agreement, we did so in settling the Buckley claim, and in the assertion of the Buckley claim on behalf of Neuburger Loeb we did so with the authorization and at the insistance of our client.

Now, if lawyers are to be held up to be the sport and victims of dissatisfied interests that don't coincide with the interests of the clients whom lawyers represent, then I say to your Honor anytime a lawyer acts on behalf of a client, he is exposing himself to a charge of conspiracy.

There is not in all of Mr. Mandel's sprawling case one scintilla, and I say this not rhetorically, I say this, your Honor, you can search your notes and your recollection, there is not one scintilla of evidence that Persky or Finley Kumble acted with malice, not one slight piece of evidence on which you could infer that the conduct of Persky or Finley Kumble was doing other than what lawyers are supposed to do, act on behalf of their clients in conflicts.

And for that we are supposed to be liable. Finley Kumble did not get any of the stock, Finley Kumble --

THE COURT: What about the famous statement that you cross examined --

MR. GRUTMAN: "If you don't do what Fred asks you to do, we'll be sorry."

THE COURT: I wrote it down while you were writing it down. Make it, "So you'll be sorry you didn't do what Fred asked."

MR. GRUTMAN: That, of course, your Honor, you will remember, is a retread and slanted nuance --

THE COURT: I agree. But that is a statement in the record that the jury is entitled to consider and give full weight.

MR. GRUTMAN: I'll take that. What that says, Judge, is when a lawyer says, whether he says it to your face or on the telephone or by letter, if we can't resolve this, we are going to sue you.

But the "we" wasn't Finley Kumble as a plaintiff. It wasn't we who were to be enriched. It wasn't we who were to be benefited. Robert Persky when he said it was the alter ego, the conduit, the surrogate, the lawyer for somebody else. And --

THE COURT: Can a lawyer overstep the lines?

MR. GRUTMAN: Not if it is on the basis, Judge, of asserting the claim which he belives has merit. The lawyer oversteps the line when he lends himself to sham, baseless litigation which he knows has no color of merit. And that, Judge, has to be proven, and Mr. Mandel has failed in that proc

You heard Burak testify. You heard Mr. Ryan, a lawyer of some eminence. It was Ryan and Webster, Sheffield's view that there was something wrong in the Buckley case which the Finley Kumble firm recognized because we didn't have the conflict that Goldenberg and Barell had. When Robert Persky said, "we" he had --

THE COURT: Mr. Grutman, I am a judge. I am not a jury. You don't have to get off into things. We are only arguing now a motion to dismiss.

MR. GRUTMAN: Judge --

THE COURT: Allegation.

MR. GRUTMAN: The allegations, I say, Judge, are utterly baseless. And if I argue it, forgive me.

THE COURT: The question is whether there is evidence in the record requiring submission to a jury. I am not going to argue the merits. I don't care about the merits. It is not my function. It is their function.

MR. GRUTMAN: I say legally there isn't any evidence that you can submit to this jury that Persky or the Finley Kumble law firm acted maliciously or that they acted without authority, with reason or in the belief that the claim was baseless.

THE COURT: Which claim?

MR. GRUTMAN: Either the Buckley claim or any claim that was asserted on behalf of their clients. There isn't any

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proof that the entire skein of complaints which originated out of the limited partners and the general partners and the subordinated lenders, which were voiced to Mr. Gross, as reasons which should be considered for finding the weight -- were asserted without good faith belief that there was merit to those claims.

THE COURT: Is the jury not entitled to draw a contrary inference from the partnership's complaint naming Charles Gross as the person who handled the Buckley transactions.

MR. GRUTMAN: No, Judge.

THE COURT: Why not? Here is a complaint that, as everybody concedes, has an erroneously named first party in it.

MR. GRUTMAN: The answer is while there was a technically deficiency in what was not yet a pleading, Charles Gross --

THE COURT: Purported to be a pleading.

MR. GRUTMAN: What purported to be or what would be a pleading and what was used as a legitimate device to bring home to Charles Gross, a man who just wouldn't see that anybody was serious. Charles Gross was legally responsible, legally he was responsible --

THE COURT: I don't disagree with what you are telling me. But I am in the position of having to determine whether or not there is an utter falsity of evidence from which a jury could conclude the contrary. So it doesn't do any good for you to say yes, but this doesn't mean that. That is for the jury to decide.

MR. GRUTMAN: The answer is that a case has to be decided on its facts, not on technical errors in pleadings or what would purport to be pleadings.

THE COURT: I wouldn't consider it a technical error for a complaint that is exhibited to somebody to say that the person handled 1100 transactions when he handled no transactions.

MR. GRUTMAN: Judge, Gross and Company --

THE COURT: I know it. But that is not what the thing says, and you know it as well as I do.

MR. GRUTMAN: I will accept the fact that there were those errors that were not later present. But the point is, those errors don't prove that Persky believed that the substantive claim was baseless. That is the ultimate profundum or that liability won't attach.

THE COURT: It seems to me the jury could conclude from that that Persky rushed together a document to show to Charles Gross to try to introduce certain conduct.

MR. GRUTMAN: The acting under the exigencies of the moment, that would not prove that Persky was doing something legally offensive or that he was sponsoring baseless lawsuit.

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That something is done in haste does not mean that it was done with malice or that it offended the law.

THE COURT: I am sorry to say I disagree with you in the overall context. I think that the jury could so find based upon the various pieces here that have been put in of one kind or another.

MR. GRUTMAN: You mean the fact that our law firm was used to type Fred Kayne's letter?

THE COURT: Look. Don't -- you are not cross examining me and putting a leading question to me to get me to say no.

MR. GRUTMAN: I am trying to engage your mind and trying to understand what you are saying when you refer to various pieces.

THE COURT: That the statement made to Charles Gross, "We'll make it so you'll be sorry" --

MR. GRUTMAN: What is wrong with that, Judge?

THE COURT: It contains an implication of a threat that if you don't go along with this we are going to give you the business.

MR. GRUTMAN: Do you know what, Judge? He didn't say he would break his legs or that he would hire a hit man. He said, "We are going to make it so that you shall be sorry." There is nothing wrong with a lawsuit --

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THE COURT: He just said, "I'll make you an offer you can't refuse," and then there was a dead horse in the bed. What does "offer you can't refuse" mean? Remember in the movie he said, "I'll make him an offer he can't refuse"?

MR. GRUTMAN: Yes, I understand that, Judge.

THE COURT: In the context that was intended to be a threat.

MR. GRUTMAN: If I said to you, believing that I had a meritorious claim, "I am going to sue you to the end of the world, I am going to get the biggest verdict I possibly can, I am going to tie you up," the law countenances that.

THE COURT: Mr. Grutman, I disagree with you as a matter of law on the total picture here of Mr. Persky's conduct. I think the jury could conclude to the contrary.

MR. GRUTMAN: I will submit on the evidence that Mr. Mandel has adduced, if that was what the jury would so find, it would require being set aside as contrary to the evidence.

THE COURT: Well, reasonable men are differing at this point.

MR. GRUTMAN: If we would go in on the churning claim, could we be guilty of malicious prosecution for the churning claim?

THE COURT: The jury will then have made its decision. That is not my question. Let's go on.

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MR. GRUTMAN: Second point, Judge.

THE COURT: 45 minutes to oath at this point and the jury is probably wondering why they are not being used on Thursday afternoon.

MR. GRUTMAN: I am not trying to waste their time or the Court's or ours. I will come briefly to the conclusion.

And I would like to touch on the last point that you raised with Mr. Shaw. And although your Honor has not asked for laborious detailed recitations of authority, there is one case that I would seriously commend for your study and that is Blackburg against Weiss, a Supreme Court decision cited at 16 Misc. 2nd 564. I will read six lines from Judge Shapiro, Irwin Shapiro's decision:

"The rule is well settled and has been reiterated time and time again that neither partners nor joint venturers can sue each other at law for anything that relates to the concerns of the partnership or joint enterprise until after a settlement and balance struck and express promise to pay."

And the string of citations, Judge, runs a third of the page.

THE COURT: Can I have that so I can see it?

MR. GRUTMAN: It concluded by saying that suits between partners should be brought in equity, particularly if accounting, and that an action at law may not be maintained until after an accounting and balance struck.

It thus follows that without an accounting, regardless of the way in which your Honor characterizes the conduct or the deals between these three aggrieved people in the partnership, there is and can be no obligation to pay.

THE COURT: All right.

MR. GRUTMAN: The last point, your Honor, I renew our motion to dismiss on the first counterclaim, a motion which we made before the start of trial, on the ground that as pleaded, that is pleaded action ex contractu, and Finley Kumble has no liability since we were not parties to the transfer agreement.

There was no fiduciary duty, there was no conflict of interest.

I likewise move to dismiss the violation of the alleged claim of fiduciary duty. I move to dismiss the alleged claim of the violation of fiduciary duty on the ground that there was no fiduciary duty. Everyone was represented by separate counsel. We did not represent Gross, Bleich or Donoghue, and I commend to the Court as authority for that ethical consideration, I believe it is, 5-18.

I likewise move to dismiss any claim against the Finley Kumble firm on the ground that we were engaged in a conspiracy to withhold the money of any of these people. We did not touch the money of these people. It was never in our hands. We never benefited or profited from it.

And I will submit there is absolutely no evidence under any maintainable theory of law that can be submitted to this jury and on which on the record as made liability could be imposed against us.

THE COURT: Let me just be clear on one thing. There is no question, is there, that if Mr. Persky is responsibl here, that the firm is similarly responsible?

MR. GRUTMAN: I believe that that is a correct statement, Judge. Except, your Honor, on the Rafkind matter, in the Rafkind case -- Mr. Gelb, your Honor, I don't believe you have met.

THE COURT: I have met him.

MR. GRUTMAN: In the Rafkind case, your Honor, the only evidence in connection with that claim, which we submit should be dismissed, is that Mr. Persky advised the executive committee that if they were to go along with Mr. Gross' request for clearance it would require an amendment of the partnership agreement. And that's all that Mr. Persky said and I don't see how that rises to the level of conspiracy unless he is conspiring with himself.

THE COURT: All right.

MR. ESTERMAN: If your Honor please, I'll be very brief, obviously. I join, of course, in the motion of Mr. Shaw and Mr. Grutman on behalf of Mr. Persky to dismiss and I will not repeat all that they said. I include, of course, Mr. Grutman's reference to the French law and I would just like to add one point, if I may.

With respect to the opinion letter, if you look at the facts as they existed at the time the opinion was given, and I don't think there is disputed in all of this record, it is very clear that there was a difference of opinion on behalf of Mr. Burak and on behalf of Mr. Persky or anyone else as to what the state of the law was in that regard at that time. And where lawyers differ there can be no responsibility if, in fact, later on it turns out that the lawyer who acted or told his client to act in reliance on what the lawyer said, and his sincerity and his knowledge of the law was such that there was a difference of opinion that was not clear, there can be no responsibility if it turns out later that he was wrong.

The cases are, as we say, "legion" in that area.

So along with the additional facts, I submit the motion should be granted.

THE COURT: All right. Mr. Biehl.

MR. BIEHL: Your Honor, at this time I would like to renew our motion that was made at the beginning of the case to

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dismiss the first counterclaim and the fifth and sixth counterclaims under Section 98 of the partnership law. That need not be argued here. It has been argued fully in our papers.

Mr. Shaw hit on the California, as far as it affects us. Section 98, the opinion letter has been hit on by Mr. Esterman and the Buckley settlement. The law has been touched on. I think they are all the high points of the alleged conspiracy.

But insofar as they affect our clients, each of those matters bears a few moments of attention.

THE COURT: You are speaking for

MR. BIEHL: On behalf of Robert Muh, Fred Kayne and Charles Sloane.

Insofar as the Buckley settlement is concerned, there is no evidence on this record that Fred Kayne or Charles Sloane knew about that settlement before it occurred or what use would be put to it.

So, therefore, the jury could not find that it was a part of an agreement that Kayne had or Sloane had with anyone else that the Buckley claim would be used to bring Gross to his feet, to get Gross, Bleich and Donoghue to agree to go along with the transfer agreement.

What we have on this, most favorably for Gross, as to Mr. Muh was that according to the testimony of Andrew

Newburger read into the record this morning that Mr. Muh knew of the settlement. More than that -- or, putting it another way, that Mr. Newburger said that Bob Muh would have known of the settlement. He was in that position at that time in October, November, December, 1970.

But that is as much as this record evidences our clients had to do with the Buckley matter, and that is claimed to have been an important part of the conspiracy.

Now, as far as the opinion letter is concerned, once again there is no evidence that either Mr. Kayne or Mr. Sloane knew of the Rosenman position at all in the closing and that Mr. Muh knew about it perhaps a day before, considered it a procedural matter, was not concerned there wasn't going to be given by one law firm and that it was going to be given by another, a perfectly innocent judgment on his part, not any evidence of a motive, not any evidence of participating in a conspiracy to make this opinion letter go along and to compel people to agree.

As to the California class action, a California actio and eventual arbitration in New York, how does that fit into th alleged conspiracy? Your Honor has evidenced some concern becau of the time it was brought, in the beginning of February, 1971, right when there was hard bargaining.

THE COURT: It followed by three days a telephone conversaion by Mr. Sloane saying, "If you don't play ball, I am going to sue you."

MR. BIEHL: And the evidence will show, and I don't want to go too far into this point, that in order for it to have followed three days that conversation, the wheels had to be put in motion two or three weeks before that. So that it wasn't the telephone conversation of Sloane that brought that about, the decision had been made before that.

So that in effect will negate the conversation of Sloane with Gross, but that is in our case.

Taking it on this state of the record, you do see a substantially long, expensive, protracted arbitration that followed, that went on for several years, that to me overshadows the fact that a few days before the transfer agreement was entered into Mr. Gross was told that he would, in fact, be sued.

He was told, he was sued, there was a counterclaim in that arbitration, as you have seen, your Honor. The counterclaim submitted by Mr. Gross was not as Mr. Silverman has tried to characterize but, in fact, it was an allegation that the arbitration was brought maliciously, there was malicious prosecution. And if that was the claim, and it was, and it was dismissed, and it was, how can you consider that the arbitration was brought in bad faith on it.

So I think that taking both the enormous investment in time and energy and money that Mr. Sloane and Mr. Kayne put into it, also the fact that it only related to their personal investment, it did not relate to the new corporation, it did not relate to anyone other than themselves, the fact that Charles Gross brought them into the partnership, the fact that he admitted on the stand that they lost substantial sums of money within the first year and they were suing to recoup that, separately states and puts this claim separate and apart from the entire thread of a conspiracy between the parties.

Now, also in a conspiracy, your Honor, there has to be some continuing thread, some, "I'm doing this and communicating this to other members of the conspiracy."

As far as the California action is concerned, all we know is that Fred Kayne told Bob Muh, in advance of bringing the lawsuit, that he was going to sue Charles Gross. That's all. We know that Bob Persky, who is representing Fred Kayne in some capacity, either through the corporation or in some way, knew a few days before the lawsuit was brought that it was to be brought. Mr. Kayne did not consult Mr. Persky in bringing that lawsuit, Mr. Kayne did not say, "Bob, should I do this to accomplish a conspiratorial end or to get Mr. Gross to go along."

He said, "I am going to do this because I have been "hurt by Charles Gross." And that's what he did do.

There is no connection between the California action and the goals of the alleged conspiracy.

THE COURT: Well, let me ask you this. My memory is that Mr. Gross testified that on the 15th of January he was at a meeting in which Persky told them it is your best interest to go along with this deal as it was structured and to convince his sister and Miss Bleich to go along, too, and the response is negative. Ten minutes after the meeting is over there is a call from Sloane from California in which he says, "Charlie, I've lost money here. If you kill the deal, you'll be sued for a long time."

Now, is that an accurate erection of what the testimony was?

MR. SHAW: Yes. Absolutely. Because there were disputes on both sides.

THE COURT: All I'm saying is that it seems to me the jury could conclude from that that somebody at that meeting, and I suppose that would mean either Mr. Risher or Mr. Persky, called Mr. Sloane and told him of what had happened at the meeting, inducing the phone call ten minutes later.

MR. BIEHL: The testimony was Mr. Persky left the meeting and telephone Mr. Kayne.

THE COURT: I remember that now. Yes.

MR. BIEHL: So the inference to be drawn, if any, is that Mr. Kayne communicated what was communicated to him second hand to Mr. Sloane and Mr. Kayne and Mr. Sloane were, in fact, united in interest.

THE COURT: Doesn't that require submission to the jury on a showing that Persky makes a statement you better go along and fails, he calls Sloane, and Sloane says -- tells him the same thing, "If you kill us, you are in trouble."

MR. BIEHL: That chronology in itself doesn't do it. What I think overcomes the apparent problem there is the belief by Kayne and Sloane in the lawsuit that they had against Gross.

MR. GRUTMAN: Or lack of proof to the contrary.

MR. BIEHL: Or absence of proof to the contrary.

MR. SHAW: You don't have to love the person you are suing, your Honor. That is the point.

THE COURT: No. But if the inference is that you are not going to be sued if you don't kill the deal and the suit is commenced, one could infer that the suit was commenced because you are killing the deal.

MR. GELB: But not because it was baseless.

THE COURT: Then this goes to the motive for it. And if the motive and if the lawsuit is brought without any basis which you could conclude from the fact that the arbitration failed --

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MR. GRUTMAN: You can't, Judge.

THE COURT: The jury can conclude.

MR. GRUTMAN: If that was so then anybody loses a case and gets an adverse verdict, they are subject to being sued for malicious prosecution?

THE COURT: One of the elements of malicious prosecution is a showing that the action was unsuccessful.

All right, gentlemen, Mr. Greenberg can't take everybody at once.

My friend here has the floor and everybody else will be quiet.

MR. BIEHL: I appreciate everyone jumping in and trying to support our position. And the position is reinforced by the fact that in that arbitration Mr. Gross did assert that the arbitration was brought maliciously and that assertion was dismissed. So I don't think it is --

THE COURT: That assertion wasn't ruled upon. That is one of the things I remember being subject to some discussion.

MR. BIEHL: That is the testimony of Mr. Silverman.

THE COURT: It dismissally went to the counsel fees that he asked for certain purposes.

All right. I understand your position on this in any event.

MR. BIEHL: Another point, your Honor, is that what jg/11/125

we have here is an alleged conspiracy to induce a breach of the partnership agreement. If there ever is -- the claims that Gross, Bleich and Donoghue assert that they had arise out of a partnership agreement. Now they come forward and say that the members of that partnership conspired with the partnership and conspired with each other to make sure that they didn't get their right under that agreement.

The law is to the contrary, that the partners cannot conspire with the partnership. So I say that the claims against our clients Kayne and Sloane as withdrawn general partners as based on that theory have no merit and should not be submitted to the jury.

MR. MOSS: Your Honor, I speak on behalf of the general partners.

MR. BIEHL: To follow that through, the only remedy that Bleich and Donoghue and Gross would have then is a claim for breach of contract and they would have that only against the existing general partners at the time the alleged breach occurred. Neither Kayne nor Sloane were partners on the date the defendants claim that the partnership agreement was breached by the entering of the transfer agreement.

THE COURT: Okay.

MR. BIEHL: And as you know, Mr. Muh was not a partner. Thank you very much.

THE COURT: Thank you.

Mr. Moss.

MR. MOSS: I speak on behalf of the general partners, who were defendants in the counterclaims.

And I join in the motions that were made by Mr. Shaw, Mr. Grutman, Mr. Esterman and Mr. Biehl.

I will be very brief. I will address myself to the three counts, the conspiracy count, the transfer agreement and the Rakind offer of employment.

With respect to the conspiracy counts, I respectfully state that there was no conspiracy proven against the general partners. They dealt at all times at arm's length with all of the diverse interests that were negotiating with respect to the transfer agreement.

The object of the conspiracy alleged was to keep the Gross -- it is claimed that the object of the conspiracy alleged -- that the object of the conspiracy was to keep the Gross money in the partnership. This was not the conspiracy. There was no conspiracy to retaliate if we didn't go along with the deal.

With respect to the transfer agreement, the general partners believed that under the special circumstances that existed the transfer agreement was valid.

With respect to the Rakind employment offer to Gross, jg/lf/126a

no malice has been shown on behalf of any of the general partners in responding to the Rakind letter for employment, offer of employment.

THE COURT: All right. Thank you.

Mr. Mandel.

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MR. MANDEL: Your Honor, is there anything in particular you would like me to respond to?

THE COURT: Yes. This last argument of Mr. Moss. I can see general partners being held in under the partnership law breach, without any question. What about the conspiracy aspects as to them? That is obviously a little more troublesome.

MR. MANDEL: Let me talk about that.

THE COURT: There are three areas, and this is one of the three, and then I'll let you speak --

MR. MANDEL: Let me talk about that at once.

My friends in part have not been talking about my case. They talk about malicious prosecution and they talk about other principles of law. Bascially, and especially with regard to the partners, our case is a fraudulent breach of fiduciary duties and obligations, and I have cited law to your Honor in our requests to charge which shows that the fiduciary duty extends beyond the time a person stops being a partner until the whole matter is wound up.

In this particular case, I would like to start first with the violation of Section 98, and that's the wrong way to put it because it is not that it is a violation of Section 98, it is that an unauthorized and improper transfer was made of the assets which amounts to a conversion.

Some of my friends argue that only the partners can be liable for violating Section 98, and our position is there is no substance to that. The fact is, Section 98 delineates the power and the authority to transfer partnership assets, and a transfer without power and without authority is a conversion.

A conversion is a tort. Everybody who participates in the tort is liable for the tort jointly and severally, and that is the Section 98 situation, for starters.

But, beyond that, we have something much more serious in this case, that it was done deliberately and knowingly. And I'm not arguing to the jury now. I'm saying there is evidence from which that can be inferred.

And what is the evidence? The evidence is that the attorney retained by the partnership came to that opinion and so advised the partners.

Burak testified as to what his opinion was and that he advised the partnership. Andrew Newburger admitted it in his deposition. Notice to one partner is notice to all.

Now, whether the partners went ahead intending knowing to disregard the law or whether they elected to take another opinion may be a jury question. But there is no doubt that there is at least a jury question there, from that fact alone.

THE COURT: This is on the conversion, aside from the Section 98 picture?

MR. MANDEL: That is correct.

THE COURT: All right.

MR. MANDEL: Now let me go further into the entire conspiracy, which was this:

Gross, Bleich and Donoghue were standing in the way of a deal that a lot of people wanted to make, and a lot of people with different interests got together and did certain things to Gross, Bleich and Donogue in order to make their deal and to avoid the impact of granting Gross, Bleich and Donoghue their rights.

Now, what did the different people do? Let me start with Persky, because in my opinion --

THE COURT: Mr. Mandel, I don't know that we need to spend all this time in that recitation. Let's go, for example, to Mr. Aixala. What is the proof against him in this case?

MR. MANDEL: All right.

The proof against Aixala is simply this:

He was one of the promoters, in a sense that he had an interest in getting the deal through. He had a chance to make a profit out of it. He was represented by Persky.

Persky's knowledge and acts I believe are imputable to him as a matter of law. So that I could say that, if Persky is guilty as a matter of law, then under some of the cases I have cited to you Aixala is guilty. At a minimum, the jury may infer that Persky notified Aixala of what was going on.

THE COURT: No, I don't think they could do that. I don't think that in a civil conspiracy, particularly where Persky is trying to get this man in with his money, the jury can conclude, in the absence of proof, that there was notification here.

What are the authorities that you say support Aixala as being chargeable with Persky's knowledge?

MR. MANDEL: In one of our requests to charge, your Honor, we have the authority on the imputation of knowledge of an attorney to a client, and the New York case is a case where admittedly the client did not know what the lawyer knew, and the client was held liable.

What was involved in that case was a contract for the purchase of land, and the lawyer, unbeknownst to the client, knew that there was a pre-existing, though unrecorded, contract for that same land to be sold to another, and this is Application of Savoy, 232 N.Y. Supp. 2d, 396, 398, which collects the authorities.

THE COURT: All right. Let me look at that. If you don't have this imputation of knowledge, then what do you have?

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MR. MANDEL: We have one other thing against Aixala from which the jury can conclude that in fact he knew, as corroboration. He lied in an affidavit, and my friends did not state the full extent of it when they said he said he was told that there was no risk and he gave an affidavit that there was substantial risk.

He did a lot more than that. He said, "I never met any of these people until after February 11th, besides Persky." And in fact he had numerous meetings with Risher.

He said in his affidavit, "This was my only contact with the matter." and in fact he had been down to the Stock Exchange, where he had to be cleared as one of the principal stockholders of the new corporation.

And that's it as far as Aixala is concerned.

THE COURT: All right. How about Mr. Muh?

MR. MANDEL: Muh? It is very, very simple.

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Muh is one o the promoters of the new corporation who stood to make, and did make, an enormous sum of money out of this deal. He wanted the deal to go through. There was no doubt about it. He had a fiduciary duty to the partnership because he was an employee of the partnership before the transfer was made.

In fact, the evidence shows that Risher and Muh were actually running the partnership for the last month or two of its existence.

Andy Newburger testified to that in his deposition. I believe I have that in the deposition --

MR. BIEHL: Your Honor, I don't believe there is evidence to that effect.

MR. MANDEL: Certainly there was, in Andrew Newburger's statement. It was read this morning. Well, we can get to that.

MR. BIEHL: No, you can't get to that.

MR. MANDEL: Shall I go on, your Honor?

THE COURT: Yes. Go on.

MR. MANDEL: Muh and Kayne and Risher and Berknowitz and Sloane were all of the promoters of the new corporation, the new team, and they were all represented by Persky. They were represented by Persky first in the negotiations with the partnership and second in their corporate activities.

Every one of these people was involved in the transfer agreement. Every one of them was there on the night of February 11th. Every one of them was exposed to Burak's statement that the transfer was not authorized. Every one of them authorized Persky to give the opinion, which we say is in bad faith and which the jury can find is in bad faith.

MR. BIEHL: Your Honor --

THE COURT: I'll hear you in a minute.

MR. MANDEL: And, your Honor, the jury can find from the circumstantial evidence here that every one of these promoters was tied into a conspiracy, was responsible for the acts of Persky and was responsible for the acts of all of the other co-conspirators.

THE COURT: How about Mr. Berkowitz?

MR. MANDEL: Berkowitz was also one of the promoters of the corporation. He denied it. He tried to say that he didn't know he would get stuck until the last night. But you remember, your Honor, there was one exhibit that was put in, a letter to the Stock Exchange -- I don't recall whether it was November or December, Mr. Gross says December 17th and I'm sure he is right -- in which in handwriting they had the name of all of the potential stockholders of the new corporation, and there was Mr. Berkowitz, like Abu Ben Adam, leading the list.

Mr. Berkowitz was recruited by Kayne to come to New York, and Kayne recruited all the rest of the new team, and Berkowitz came, as he testified, with the understanding that there would be a good possibility of a position for him if they took over control of the Newburger, Loeb business. That is his obvious testimony.

Now, did Berkowitz himself do anything? Yes, sir, he certainly did. Berkowitz acted in furthering the conspiracy in the Rafkind matter. Berkowitz acted and was present on the night of the illegal closing on February 11th. Berkowitz also was one of those instrumental in having the partnership make the settlement with Buckley which was used as the dagger at the throat of Gross, Bleich and Donoghue.

Your Honor will recall that both Berkowitz and Persky testified that they were in on the settlement, that they were in favor of it. I believe Risher got a written report on the settlement from Berkowitz, and Berkowitz tried to protect himself, in testifying, by saying somehow he had the impression that it was a discretionary account.

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Persky also made the claim that he had the impression that it was a discretionary account.

Given the facts of this case and the status of the file, those claims are incredible, or at least the jury can so find, and I would submit to your Honor that the claim that they thought the account was discretionary is really a confession that they knew there could not be liability in this case if the account was not controlled.

Both Persky and Berkowitz, who were representing the partnership in making this settlement, and each of them as attorneys for the partnership, had a fiduciary duty not to manipulate a settlement to the disadvantage of any partners.

And not only do I say to you that the jury could find that they did, I say the evidence compels a finding that they manipulated that settlement. Persky himself virtually confessed it.

One thing more I should mention to your Honor. I have made a motion to you, which is a very serious motion still pending, that an assignment was taken by a joint tort feasor. This was not a case of a claim over which might have been proper. This was a case where they made the best possible deal they could with Buckley, got what they could out of Buckley, and for nothing took an

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assignment of that claim, which they held against Gross, Bleich and Donoghue for four and a half years, to hold off $4 or $5 hundred thousand worth of claims of capital.

And I say to you there can't be any doubt about Mr. Berkowitz or Mr. Persky, if anybody can be held in this matter.

Now I should say one further thing in answer to Mr. Grutman, although your Honor has not asked me.

THE COURT: Can I continue with some problems that I have here?

MR. MANDEL: All right. Yes.

THE COURT: What about the Rafkind interstate commerce and conspiratorial aspects of the antitrust claim? The interstate commerce aspects I assume flow from some authority that says that, if you are going to trade in a national stock exchange, such proposed trading would have an effect upon interstate commerce and that satisfies the commerce aspect.

Am I correct about that?

MR. MANDEL: Yes.

THE COURT: What is the conspiratorial proof on Rafkind?

MR. MANDEL: The conspiratorial proof is that Berkowitz --

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THE COURT: Berkowitz sends a letter and tells him about --

MR. MANDEL: In Berkowitz' testimony this morning he said he cleared it with Newburger. Do you recall that? It was not Berkowitz going off on his own; he cleared it with Newburger, the partner.

So that you have, right then and there, the partnership doing it in conjunction with Berkowitz, who was one of the promoters of the new corporation.

In addition to that, your Honor, on the Rafkind matter, one of the notes of the meetings -- I don't know offhand whether it was the meeting of February 5th or February 8th -- contains a statement by Risher saying, in effect, "Charlie Gross says he needs capital."

I'm not purporting to quote it, your Honor, but I'm giving it in a way that the jury can interpret it. Risher says at one of these meetings, as written down, "Charlie Gross says he needs capital, cash to go into business. But if would make this deal, he has an employment opportunity with Rafkind."

Furthermore -- all right. That is Exhibit FFF for identification. It is in evidence. Excuse me. I am getting carried away.

And what we have is, on one page we have, "Risher-trading with Rafkind, with Charlie Gross." I am reading right from the document itself.

And then, on the next page, at the top of the page, "Risher: Charlie Gross has employment opportunities without capital."

Now, this tells us two things. This tells us that Risher knew all about the Rafkind situation and it tells us that Risher was willing to say openly at a meeting, "If Charlie Gross will go along, then he can have this delicious employment with Rafkind."

THE COURT: Is that Exhibit FFF?

MR. ROTHMAN: FFF. That is one of Mr. Silverman's.

THE COURT: I see.

MR. MANDEL: If this is regarded as a constant thread of a conspiracy, what Berkowitz new and what Berkowitz did, what Newburger knew and what Newburger did, what Risher knew and what Risher did is attributable to all of the conspirators.

THE COURT: All right.

I take it that all of the partners, general partners, are held in, according to your theory, on the ground that they are converters as of February 11th.

MR. MANDEL: That's right, your Honor.

THE COURT: Are there any other grounds?

MR. MANDEL: For the general partners?

THE COURT: No. Are there any other withdrawn general partners who are involved in this case at all?

MR. MANDEL: Kayne was a withdrawn general partner.

THE COURT: He is in a different category.

MR. MANDEL: He came into the other category, both.

THE COURT: As you urge it.

All right.

Is there anyone else who is in Mr. Gross' position, that is, here? We've heard nothing, for example, about Mr. Settel or Mr. Richards or one of the Roggenburgs other than the fact that they are signatories.

MR. MANDEL: They are all signatories to the February 11th agreement.

THE COURT: And that is the only proof against them?

MR. MANDEL: That's correct.

THE COURT: Is that enough to permit the jury -- no. The Section 98 ground is sufficient for them.

MR. MANDEL: Because, if they were signatories, they were there, their attorneys were there, they could have heard what Burak, representing the partnership, said. They knew what they were doing.

One thing more.

THE COURT: In any event, they are in the case because of Section 98.

MR. MANDEL: Not only that, your Honor. There is one thing more that I have not mentioned that is vitally important.

In that binder there is a document which says, which I read to you at one time and which should not be overlooked, that even though the corporation is assuming all of the liabilities to everybody, no settlement will be made to pay Charlie Gross without the consent of certain other people.

Now, that document is positive proof that everybody who was present on February 11th and signed the agreement knew and intended that Gross would not be paid, and the only way anybody could avoid paying Charlie Gross after that was to assert some claims against him.

4 Because, though my friend Mr. Shaw argues that nobody knows what a partnership interest is or its value or so forth, that was not true about Donoghue and Bleich. Their amounts were fixed at $75,000. It was owed to them by the general partners. That depends upon an

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interpretation of the agreement, which may be clear, your Honor. I don't think there can be any question about it.

Mr. Biehl's brief I think makes the point, some of the other documents make the point, and everybody knew that Charlie Gross had positive capital.

Now, the positive capital that Gross had, your Honor, was not just that there was something left over --

THE COURT: Mr. Mandel, I don't know that you need to argue this at this point.

I will take a recess for ten minutes.

MR. GRUTMAN: May I hand you one page, your Honor?

THE COURT: You may.

(Recess.)

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Jack Greenberg

Official Court Reporter
U. S. District Court

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(Jury present)

(Defendant's Exhibit Triple L for identification was received in evidence.)

MR. MANDEL: I am reading from a portion of the brief submitted on behalf of all of the adversaries about two years ago in this case. The heading is "Point 8," and it says this.

(Mr. Mandel read to the jury from Defendant's Exhibit Triple L in evidence.)

THE COURT: With that you rest your case, is that right?

MR. MANDEL: Yes, sir.

THE COURT: And I have the motions under advisement and counsel may proceed.

MR. SHAW: Your Honor, I call Angel Aixala.

ANGEL M. AIXALA, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Aixala, where do you reside?

A Now I reside in Puerto Rico.

Q And how long have you resided there?

A Since May 26th of this year.

Q And before that where did you reside?

A Miami, Florida.

Q And how old are you?

A 39.

Q Are you married?

A Yes.

Q And what is your wife's name?

A Alicia.

Q Do you have children?

A Four.

Q And how are you employed presently?

A By Bacardi Corporation.

Q In what capacity?

A General manager of operations in Puerto Rico and the Virgin Islands, sales.

Q Will you tell us briefly something about your educational background?

A I went to grade school in Cuba. Then I went to milita school in the States called Culver Military Academy. From 1949 to 1953 I went to the University of Villanova in Havana, Cuba.

Q And were you born in Cuba?

A Yes.

Q And did there come a time when you left Cuba and came to live in the United States?

A Yes.

Q When was that?

A October 27, 1960.

Q Now, did there come a time when you met a man by the name of Robert Persky?

A Yes.

Q When was that, sir?

A The spring of 1970, can you briefly describe to the jury your business experience?

A In Cuba?

Q In Cuba and in the United States. What businesses have you been in?

A I flew for an airline in Cuba, I started as a ticket agent and had different jobs at the airline. Then I became a pilot. And after that I worked for the --

Q Could you keep your voice up so I can hear you back here?

A Soft drink company and a beer company, also in Cuba. And when I came to the States I worked in the boat yards that my father bought, selling boats and we manufactured them.

Q During the period from 1960 through 1965 were you employed in business?

A No.

Q And in 1965 you began business activities, correct?

A I think it was a little before '65.

Q Would you describe the nature of your business activities after 1965?

A Well, I was working for the boat company. I would sell boats that we manufactured.

Q When you met Mr. Persky, how were you employed?

A By the boat company.

Q Now, can you recall where it was that you first met him?

A It was in a hotel in Miami Beach.

Q And who was present?

A Persky and his wife and Morton Kaplan and his wife, myself, and I believe that's all.

Q And can you tell the Court and jury the substance of this initial conversation?

THE COURT: When was this?

THE WITNESS: This was the spring of 1970, your Honor, I believe.

Q The substance of this initial conversation between you and Mr. Persky?

A It was just to get to meet him.

Q When did you meet Mr. Persky again?

A I don't know exactly, but I would guess it would be sometime during the summer of 1970 or before.

Q Let me ask you this question. As of the summer of 1970 had you ever heard the name Newburger, Loeb and Company?

A Never.

Q And as of the summer of 1970, had you met any of the persons involved in this case except for this meeting with Mr. Persky?

A No.

Q Now, when did you meet Mr. Persky again?

A I said I think it was in the summer of 1970.

Q And thereafter when did you see him?

A I would see him periodically from then on.

Q Now, did there come a time when you had a conversatio with Mr. Persky regarding some sort of an investment?

A Yes.

Q When was that, sir?

A I think it was September or October of that same year.

Q And where were you when you had this conversation?

A I believe we just had lunch and we were walking back to his office.

Q And can you recall where you had lunch or in what city you were?

A It was here in New York.

Q And can you tell the Court and jury the substance of this conversation you had with Mr. Persky when or after you had lunch with him in New York City?

A That there was a possibility of an investment in a brokerage firm and that if I would be interested.

Q Anything further?

A I don't believe anything further.

Q Now, thereafter, did you have any contacts or communications or conversations with Mr. Persky about this investment?

A I talked to him two or three times at least.

Q During what period of time was this?

A From September and October on until December or January.

Q All right. Now, can you tell us what you recall you were advised by Mr. Persky and what he said to you during this period of time regarding an investment?

A He said if I was willing to put up the stock for this transaction that it would be a very, very good investment for me and that I would get the dividends of the stock plus some interest plus some stock into the corporation.

Q What stock did he mention? What did he say?

A The Bacardi stock.

Q Bacardi stock.

Now, at or about this time, did you or your family or your wife own certain shares of Bacardi stock?

A Yes.

Q Would you describe those shares?

A They are common stock of Bacardi Corporation.

Q How many?

A 8,000. I think it was 8,503.

Q And were these shares registered shares or were they unregistered shares?

A They were registered shares.

Q And as of this point, the fall of 1970, can you recall approximately what the market value of those shares were?

A I believe that at that time it was about $120 a share.

Q $120 per share?

A Yes.

Q So that's about $1,000,000, correct?

A Yes.

Q And what was your wife's maiden name?

A Alicia Castroverde.

Q And how had she acquired those shares?

A Given to her by her mother.

Q And who was her mother?

A Elvira Covani.

Q And was she related in some fashion with the family that formed the Bacardi Corporation?

A Yes.

Q At or about this time, when you had the conversation in relation to this investment to discuss these Bacardi shares, did Mr. Persky say anything else to you regarding the nature of the investment which you might make?

A The only thing that I remember was that I asked him that I would be interested if the Bacardi stock wouldn't be at risk.

Q Yes? And what did he say?

A He said that if the deal went through there would be something that it would be very, very hard to have any problems.

Q Did he elaborate on that?

A Not at that moment, I don't think.

MR. MANDEL: Excuse me. Mr. Aixala, could you please speak a little bit louder? I am having trouble hearing. It is probably my fault. I am not criticizing.

MR. SHAW: That is why I am standing back here, to make sure I hear. Can everybody hear?

Q Try to keep your voice up a little more.

On this occasion or thereafter, did Mr. Persky indicate anything further to you with respect to the nature of the company or what the matter involved?

A Would you say that again, please?

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Q On this occasion, did Mr. Persky say anything else to you with respect to the company?

MR. MANDEL: Excuse me for one moment. I object because we don't think we have had a time fixed for "this occasion." This is a series of conversations.

THE COURT: Let's get the time fixed. Go ahead.

Q You say that you had a conversation with Mr. Persky during November and December and January of 1970-71?

MR. MANDEL: It can't be a conversation.

Q A series of conversations, correct?

A Yes.

Q When was it that Mr. Persky first mentioned the possible investment that you might make?

A I think originally it was around September and October, and some time went by and the conversations progressed and I think he said it again sometime in December.

Q Can you recall whether you took a trip outside of the United States during 1970?

A I believe I'm almost positive I did but I'm not sure.

Q And what country did you go to?

A In '70?

Q Yes.

A I went to Chili.

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Q Can you recall when you went to Chili?

A In November.

Q And did Mr. Persky mention this investment to you before November of 1970 or after?

A Before and after.

Q Did Mr. Persky say anything else to you prior to November of 1970 regarding the investment?

A Other than that it was a brokerage firm and so on?

Q Yes.

A No, I don't believe so.

Q After you came back to the United States from Chili, did you have any further conversation with Mr. Persky about this investment?

A I believe that in December, he called me to come up to go to the New York Stock Exchange.

Q And did you come to New York?

A Yes, I did.

Q And did you go to the New York Stock Exchange?

A Yes, I did.

Q And what happened there?

A I met a man named Dilger that wanted to meet me.

Q And did you and Mr. Dilger have a conversation?

A Yes. He asked me my name. He asked me about the stock, if I had any position in Bacardi. And I think he also asked me if I was going to have anything to do with Newburger Loeb. That was about all that I can recall.

Q On this occasion, in addition to speaking to Mr. Dilger, did you do anything else? Did you speak with anybody else, for example?

A I talked to Paul Risher and Bob Persky.

Q When for the first time did you meet Mr. Risher?

A That day.

Q And is this the gentleman sitting at the counsel table?

A Yes.

Q And what, if anything, transpired on that occasion between you and Mr. Risher?

A I met him. We talked generally. We went to the subway to the New York Stock Exchange and we said good-bye. That's about all.

Q Now, thereafter did you have any further conversation with Mr. Persky or Mr. Risher or anybody in relation to this investment?

A You mean during December?

Q Yes.

A I don't believe so.

Q As of December of 1970, had you received any financial statements relating to the company or the investment?

A No.

Q And had you received any other information with respe to the investment as of December, 1970?

A No.

Q Will you tell us what, if anything, occurred during the month of January, 1971, with respect to this investment?

A I believe that Mr. Persky asked me for a power of attorney to represent me and I believe that was all.

Q And did you give him the power of attorney?

A Yes.

Q And did you have any conversation with Mr. Risher during January of 1971?

A Yes.

Q And what did you and Mr. Risher discuss?

A He introduced me to a gentleman that was working for Newburger Loeb and they were having a drink at a place here in New York, I just happened to meet him, introduced him to me, and that was all.

Q Who was that gentleman?

A I don't know.

Q And did anything else occur during January of 1971 involving this investment?

A I don't believe so.

Q What, if anything, occurred during February of 1971?

A The only thing that I would recall was that Mr. Persky would have called me that the deal was going to close and for me to send him the shares of Bacardi.

Q And did you do that?

A Yes.

Q Did you come to New York during February of 1971?

A I don't know. But I don't think so. I didn't come to bring the shares. So --

Q What did you do with the shares?

A I'm not sure if I mailed them or if a friend of mine brought them up.

Q And what else, if anything, occurred involving this investment during February of 1971?

A Nothing that I can recall.

Q After February of 1971, did you have any conversation with Mr. Persky or Mr. Risher or with anybody about the investment?

A I probably did.

Q Can you recall who you spoke with?

A I talked to Risher, I talked to Persky and I talked to Muh.

Q What were you advised by Mr. Risher after February of 1971?

A I don't think I was advised by him of anything. I jus met him, went down to the office of Newburger Loeb, which I had never been, and I think that was it.

Q And what were you advised, if anything, by Mr. Persky about the investment?

A The transaction had gone through, that I was to receive certain percentage, a certain amount of stock, that I was going to get a monthly statement of how the corporation was doing. That's all that I recall.

Q And did you receive stock in the corporation?

A Yes, I did.

Q The stock is Newburger, Loeb Company, Inc., correct?

A Yes.

Q And how many shares of stock in that corporation did you receive?

A 210,000.

Q And did you also receive interest on the investment?

A I did.

Q Now, did there come a time when you received back the stock?

A Yes.

Q When was that?

MR. GRUTMAN: Which stock is that, your Honor?

MR. SHAW: The Bacardi stock.

A December 31, 1973.

Q And was that in accordance with the terms of the agreement?

A Yes.

MR. MANDEL: I object to that.

THE COURT: Yes. Sustained. Strike it out.

Q Did you receive any documents from Mr. Persky or anybody in relation to the investment after it had been paid?

A Yes.

Q What did you receive?

A I received a book with all the papers and everything that had to do with the transaction.

Q A book such as this (indicating), referring to Defendant's Exhibit Y in evidence?

A Very similarly, I believe, with my name on it.

Q Weighing about five pounds?

A Yes.

Q Did you read it?

A Yes.

Q Did you understand it?

A No.

MR. ROTHMAN: Was the answer yes or no finally?

THE COURT: The answer was a shaking of the head.

Q Were you ever advised about any problem that Mr. Persky or anybody was having in putting this deal together?

A I was advised that there were many partners and that it was hard to get them all at the same time because they were all over the country and some were outside of the country, and so on.

Q Were you ever advised of anything involving Charles Gross or Mabel Bleich or Jeanne Donoghue?

A No.

Q Were you ever advised of anything involving the Buckley claim or a churning claim?

A No.

Q Were you ever advised of Section 98 of the partnership law?

A No.

Q Do you know what Section 98 of the partnership law is?

A No.

Q Did you ever meet Charles Gross?

A No.

Q Did you ever meet Mabel Bleich?

A No.

Q And a time came when you were sued, correct?

A Yes.

Q When was that?

A I guess it would be either February or March or

April of that year.

Q And in this lawsuit you were named as a co-conspirato can you recall that?

A All I recall was that I saw my name.

Q Did you read the complaint?

A Yes.

Q You read the pleadings, correct?

A Well, whatever.

Q Whatever it was.

A The papers.

Q Now, did there come a time when you had a conversatio about a certain motion that was made in the lawsuit?

A Yes.

Q And was that in person or over the telephone?

A I don't recall.

Q Pardon me?

A I don't recall.

Q I show you Exhibit Triple S and ask you if you recognize it.

A Yes.

Q And do you recognize that as a copy of an affidavit that you signed in this case?

A Yes.

Q Now, prior to signing the affidavit, who did you speak with?

A I don't recall speaking to anyone.

Q And did you read the affidavit before you signed it?

A Yes.

Q And is the affidavit true or false?

A To my opinion it is true.

MR. SHAW: No further questions.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q The stock of the Bacardi Company which you invested was stock that you got out completely, your investment was returned to you, is that correct?

A Yes.

Q And was the interest that was agreed to be paid to you likewise paid to you?

A Yes.

Q At the time that you had the conversations with Mr. Persky, was there any discussion in which you were asked to partic[illegible]e in any conspiracy?

MR. MANDEL: I object.

THE COURT: Sustained as to form.

Q Was there any mention of your investment being related to activities about people named Gross, Bleich or Donoghue?

A No.

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MR. GRUTMAN: No further questions.

CROSS EXAMINATION

BY MR. GLATZER:

Q Mr. Aixala, before February 11, 1971, had you ever met Charles Sloane?

A I don't believe so. No.

Q Had you ever spoken to him on the telephone?

A No.

Q Fred Kayne, same question?

A No.

Q Robert Muh?

A I believe I met Muh.

Q Before February 11, 1971?

A Yes.

Q Do you recall under what circumstances?

A I was going out of Finley Kumble and he was coming in and somebody introduced us. He went on his way.

Q Was that the extent of the conversation, that introduction?

A Yes.

Q Have you ever heard of a lawsuit in California by Mr. Kayne and Mr. Sloane against Charles Gross?

A No.

MR. GLATZER: I have no further questions.

A That's correct.

Q What was the name of that company?

A Microthermal.

Q Microthermal?

A Yes.

Q Is that the company Mr. Persky got into trouble with later?

MR. GRUTMAN: Objection, your Honor.

THE COURT: Isn't that already in the record?

MR. GRUTMAN: Exactly.

THE COURT: Sustained.

MR. SHAW: It is the same Microthermal, your Honor.

THE COURT: All right.

Q And the Mr. Kaplan who introduced you to Mr. Persky was one of Mr. Persky's co-defendants who also --

MR. GRUTMAN: Now, your Honor, the purpose of this is not to elicit anything. It is just to put a stench in the record.

THE COURT: Sustained.

Q Now, when for the first time did Persky begin to talk specifics about your putting up the Bacardi stock and what you would get for it?

A I would say it would be December.

Q December?

A Yes.

Q At any time prior to December, did he ever suggest to you that maybe you should make the investment in the partnership?

A I don't know.

Q No?

A I don't know.

Q Is it your testimony that he was always talking about your making the investment with the new group?

A I don't know. He just said that the investment in the brokerage firm. I don't know which corporation, which partnership. He never mentioned the name, I don't believe so.

Q And you didn't ask him?

A No, I didn't.

Q All right.

In December he became more specific, is that right?

A Probably.

Q And what did he tell you in December?

A That I would have to put the stock up, that I would get an interest plus I would get -- the interest that was accrued by the stock, an interest for lending the stock, plus some stock into the corporation.

Q Did he tell you how much stock you would get in the corporation?

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A No, he did not.

Q Did he tell you what percentage of the total corporat
stock you would own?

A No.

Q Did he tell you the class of stock you would get in the corporation?

A No.

Q Did he give you any details about the extent of the risk in putting up the Bacardi stock?

A No.

MR. GRUTMAN: I object. While this is all interesting, I fail to see its relevance to any issue in the case or Mr. Aixala's involvement in the case.

THE COURT: I'll permit some of this. Go ahead. Overruled.

Q Did he tell you the name of the company in December?

A I believe so.

Q And did he tell you the names -- and that was NeWburg
Loeb, is that right?

A I believe so.

Q And he told you it was going to be a new corporation, is that right?

A I don't recall telling me that a new corporation. They would have new people managing it.

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Q And did he tell you the name of any of the new managers in December?

A If he mentioned, he mentioned Paul Risher and Bob Muh and Fred Kayne.

Q And did he tell you about their backgrounds?

A He told me that he had met Risher two or three years before. And he was very, very impressed with him, and that he had met Muh and Kayne and was also impressed with them as being very hard working people.

Q And did he tell you he was their lawyer?

A I don't believe so.

Q Before you made the deal on February 11th, did Persky tell you at any time that he was the lawyer for the corporation you were making the deal with?

A I don't believe so.

Q Before you made the deal on February 11th, did Persky tell you that he was the lawyer for the partnership that was being bought out?

A I don't believe so.

Q He told you there would be no risk to your investment, is that right?

A I believe so.

Q Did he explain how there would be no risk?

A Well, the things that I remember that he mentioned jg/lf/169 Aixala-Cross

was that I would have a senior subordinated agreement and that there would be enough cushion that for the three years that I was supposed to be in that he didn't see any reason why that would be any problem, plus there was a clause that if the capital was less than 750,000, I automatically could ask them to have my stock back and he thought that those two things would make it very, very safe.

Q Who was going to watch the capital amount for you?

A He was.

Q Now, when did Mr. Persky become your lawyer?

A I don't know how to answer that, sir.

Q Well, did there come a time when Mr. Persky became your lawyer?

A Well, was he being my lawyer then? I don't know if at that time he was being my lawyer, since September or October or if it was when I gave him the power of attorney, whenever I gave him the power of attorney, or if it was when he signed the paper for me. I don't know exactly what time.

Q You relied on his advice in making this investment?

A Yes, I did.

Q Entirely?

A Yes, sir.

Q You investigated the matter in no other way --

A No.

Q -- except by talking to him?

A That's correct.

Q And you gave him a power of attorney?

A Yes, sir, I did.

Q And he signed an agreement in your name?

A Yes, sir.

Q A series of agreements, in fact, a number of papers?

A I don't know how many papers.

Q And you trusted him, is that right?

A Yes, sir.

Q You allowed him to negotiate the deal for you to get the best possible deal, is that right?

A That's right.

Q And when you gave him that permission, or when you gave him that duty, did you know that he was also representing the party on the other side?

A I don't believe so. I don't know.

Q Now, did Persky ever tell you that there was litigation threatened about this proposed deal?

A No.

Q He never warned you of that?

A You mean before February 11th?

Q Yes.

Q Yes, before February 11th.

A No.

Q Did Persky ever tell you that some people claimed that the deal could not be made without their consent?

A I don't believe so.

Q Did Persky ever tell you that a lawyer representing the partnership named Burak had given an opinion that the deal could not be made without the consent of Bleich and Donoghue?

A No.

Q Now, before the papers were signed on February 11th, did you know what you were going to get for your million dollars?

MR. GRUTMAN: Your Honor, we have had this. He has already answered, he didn't know how many shares he was getting.

THE COURT: I believe he did.

MR. GRUTMAN: He gave him a power of attorney to make the best deal for him.

THE COURT: It is a question of what he got. I believe he answered that.

MR. GRUTMAN: He said he got 210,000 shares of common stock.

THE COURT: But I think there is a loan agreement that hasn't been testified to.

Q When you went to the stock exchange and spoke to Mr. Dilger, was there any discussion of the financial situation of Newburger Loeb?

A I don't believe so. If there was, it was between Dilger and Persky and Mr. Risher. I wasn't aware what they were saying.

Q Did Persky or Risher ever tell you that your Bacardi stock would be the principal infusion of new capital that would enable this new group to get control of the Newburger Loeb business?

A I believe that Persky told me that this would be necessary to get the company going.

Q When did he tell you that?

A Sometime in December or January, or when he asked me to invest, that that was the reason why I would be investing.

Q Did he tell you that you were investing very much more than all of the other members of the new group put together?

A I don't think that conversation ever occurred.

Q He didn't tell you that Risher was only putting in $10,000?

A I don't believe so.

Q And he didn't tell you that Muh was only putting in $10,000?

A I don't believe so.

Q And he didn't tell you that Kayne was only putting in $10,000?

MR. GRUTMAN: Your Honor, you have on previous occasions I think restricted things to modest inquiry. I press my objection because I fail to see the relevancy of all of these questions to any issue which remains in this lawsuit. Mr. Aixala was a subordinated lender.

THE COURT: We are inquiring of a particular witness.

MR. GRUTMAN: But comparisons between what he was getting and/or people was getting.

THE COURT: Whether he was told this at the time.

MR GRUTMAN: Whether he was or wasn't is the point of my objection. I don't see that it is related to any conspiracy or any other issue in this case.

THE COURT: There is always an issue of the credibili of a witness.

MR. GRUTMAN: This witness or some other witness, your Honor?

THE COURT: This witness.

MR. GRUTMAN: Very well.

BY MR. MANDEL:

Q There came a time when you signed an affidavit in this case, is that right?

A Yes.

Q And nobody spoke to you on the phone before that time to see if the information was correct, is that right?

A I don't recall anybody calling me. They might have, but I don't recall.

Q And when you got the affidavit, you signed it and sent it back, is that right?

A Yes. That's right.

Q And you don't know if you even read it, is that right?

A I think I read it. I might not have read it very carefully, but I read it.

Q Now, you say today that you believe the affidavit was truthful; is that what you said today?

A Yes, sir.

Q Do you recall that on deposition you said that there were things in it that were not truthful?

A That they were not right. I wouldn't say it is truthful or not truthful. That they were not right.

MR. MANDEL: Your Honor, in the interest of saving time I am not going back to the affidavit with Mr. Aixala and the deposition. It is already in the record.

Q Now, you know, don't you, that the affidavit said that you were taking a substantial risk with your money?

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A Yes.

Q That was not accurate. Let's put it that way, is that correct?

A That's correct.

Q And the information in that affidavit came from whom

A I believe from Mr Roth.

Q Now, you said in the affidavit that you had never met anybody connected with Newburger Loeb until after February 11th. Is that correct?

A I don't believe so.

MR. GRUTMAN: Mr. Mandel said he is not going to wast our time by rehashing it, Judge.

THE COURT: Let him proceed.

Q Paragraph 8 of the affidavit says, "Apart from casual meetings with various personnel of Newburger, Loeb and Company, Inc., subsequent to February 11, 1971, that is the total extent of my involvement in this matter."

Now, is that paragraph correct, Mr. Aixala?

A No, it is not.

Q Pardon me?

A It is not.

Q Because before that date you had met Risher, you had gone to the New York Stock Exchange, who wanted to have a look at you as a principal investor, right?

A Right.

Q You had met Muh and maybe one other gentleman, whose name you don't recall, is that correct?

A I'm sorry. I was reading.

Q And beside Risher and Muh, before February 11th you had met one other gentleman whose name you didn't recall.

A Correct.

Q Is that correct?

A That's correct.

Q Now, you said in paragraph 3 of your affidavit that the proposition came up to you, was brought to you by Persky in December of 1970, right?

A Right.

Q The fact is you had been talking to Persky about it since September or October, is that right?

A I was talking about the investment in the corporation.

Q Since September and October.

A Yes.

Q And it was not brought up for the first time in December.

A The terms were brought up first in December.

Q Now, when you gave Mr. Persky your power of attorney, you believed he was an attorney of repute and integrity, is that correct?

A That's correct.

MR. MANDEL: I have no further questions.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q In the course of the series of questions just asked you now by Mr. Mandel, he inquired whether at the time that you were negotiating or discussing the proposed transaction with Mr. Persky whether you trusted and relied upon Mr. Persky. And I take it you said that you did?

A I did.

Q And having been in the transaction, do you still trust Mr. Persky?

A Yes, I do.

MR. GRUTMAN: No further questions.

REDIRECT EXAMINATION

BY MR. SHAW:

Q Just two points. Mr. Mandel brought out the fact that you were of the view that the transaction was relatively risk free or had no substantial risk because of various cushion and I believe that hasn't been described for the jury.

Do you recall what Mr. Persky advised you with respec to these cushions, the way that risks would be minimized in this transaction?

A I believe that he said that by being a senior subordinated lender I would be ahead of all the other partners, so there would be only the general creditors, and t[illegible] the company whatever amount that it owed, it had sufficient assets to pay that.

And also that if ever the net worth of the corporatio went under 750,000, that I had a chance of getting my stock back, and I would imagine that those 750,000 was to pay the creditors that were before mine.

Q Also, I believe that you indicated in response to what Mr. Mandel asked you that you couldn't recall whether or not you had any conversations with anybody prior to the time that you received and executed that affidavit. Let me just show you this document and ask you to look at it and ask you whether it refreshes your recollection as to whether you had a conversation prior to the time that you received the affidavit.

(Plaintiff's Exhibit 121 was marked for identification.) xxx

A It says so here that he talked to me.

THE COURT: No. But does that refresh your recollection?

THE WITNESS: No, sir, it doesn't.

Q Do you recognize that document before you?

A I believe that I received it.

Q Was that the covering -- copy of the covering letter?

THE COURT: No.

MR. SHAW: Withdrawn.

Q Is that a copy of the letter that you received?

A Yes, sir.

Q What did you do with the original?

A I threw it away.

MR. SHAW: I offer this in evidence.

MR. MANDEL: No objection.

(Plaintiff's Exhibit 121 for identification was received in evidence.)

xxx

MR. SHAW: I want to read a portion, your Honor.

MR. MANDEL: Read the whole thing, Mr. Shaw. If you don't, I will.

MR. SHAW: All right.

(Mr. Shaw read to the jury from Plaintiff's Exhibit 121 in evidence.)

(Mr. Mandel read to the jury from Plaintiff's Exhibit 121 in evidence.)

BY MR. MANDEL:

Q Do you remember receiving this letter?

A Do I remember receiving that actual letter?

Q Yes.

A No, sir, I don't.

Q You do not. Do you remember having any conversation with Mr. Persky about the contents of your affidavit before you received it?

A I don't remember.

Q When you got this letter, did you understand that Persky was going to serve a copy of your purported affidavit before he actually had one in his own hands?

MR. SHAW: Your Honor, I object to that.

THE COURT: Why?

MR. SHAW: I object to that. Whether or not this --

MR. MANDEL: All right. I'll withdraw it because the witness said he doesn't remember getting the letter at all.

MR. SHAW: Okay.

MR. MANDEL: Are you through?

MR. SHAW: Yes.

RECROSS EXAMINATION

BY MR. MANDEL:

Q You were talking about the cushion of $750,000. Is that the amount?

A Yes, sir.

Q Did Persky tell you directly or by implication that $750,000 ahead of you would be enough to protect you against liability to creditors?

A I don't know if he said those exact words, sir. But he inferred that 750,000, in other words, if the net worth came down to 750,000 it would be enough that I still would get my notes completely.

Q Without risk.

A Yes, sir.

Q Did he tell you the rate at which the business had been losing money?

A No, sir.

Q Did he tell you the leasehold liabilities of the business running ahead for years?

MR. SHAW: Objection, your Honor. Hos is this releva

THE COURT: I don't know.

Go ahead. You may answer.

Q Did he tell you that?

A No, not that I recall.

Q Did he tell you that there was a potential liability to two people -- three people named Gross, Bleich and Donoghue in excess of $300,000?

THE COURT: I think he answered that question.

MR. SHAW: I asked that question.

THE COURT: Yes. He answered that question.

MR. MANDEL: Nothing further.

THE COURT: You may step down.

(Witness excused)

PAUL D. RISHER, called as a witness in his own behalf, having been first duly sworn, was examine and testified as follows:

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Risher, how are you employed at the present time?

A At the present time I am a vice president of Evans and Company and as such I am in charge of the Newburger Loeb Division of Evans and Company. And I am also the presider of Newburger, Loeb and Company, Inc.

Q And how long have you been the president of Newburge Loeb and Company, Inc.?

A Since February, 1971.

Q And do you own stock in that corporation?

A Yes, I do.

Q How many shares do you own?

A I own approximately 360,000 shares.

Q And are you married?

A Yes, I am.

Q And do you have children?

A I have two children.

Q Will you describe for the Court and jury your educational background and your business background prior to

the time that you became the president of the plaintiff corpora
tion?

A Yes. I was born in Huntington, West Virginia, and I grew up there. I have a mechanical engineering degree from Duke University. After graduation from college I went to work for Proctor and Gamble in Cincinnati, Ohio.

I left there to join the Olin Corporation, which was forming an aluminum division, and I was with Olin for a few years. I left there in mid 1960 to join a management consultir firm by the name of McKinsey and Company. I was with McKinsey and Company until 1969. I left McKinsey to form a management consulting and venture capital firm by the name of Risher, Muh and Company, Inc., and that firm operated for approximately two years and was dissolved at the time of the transfer arrangements with Newburger Loeb.

Q Now, did you make or did you lose money as a result of your purchase of stock of Newburger, Loeb Company, Inc.?

A I have lost money.

Q How much?

A At present it is not completely determinable, but in excess of a hundred thousand dollars.

Q Now, can you tell the Court and jury when you first had any contact with Newburger, Loeb and Company?

A In late July or early August of 1970.

Q And who did you speak with for the first time?

A I spoke with Fred Kayne.

Q And can you recall where you spoke with him?

A Yes. I spoke with him at the Navarro Hotel in New York.

Q And at that point were you in business with Mr. Muh?

A Yes, I was.

Q And thereafter did you do work for Newburger, Loeb and Company?

A Yes, I did.

Q During what period of time?

A From the beginning of August until the corporation was formed and the transfer arrangements were entered into in February 11, 1971, at which time I became a full time employee of Newburger, Loeb and Company, Inc.

Q And will you describe to the Court and jury the natur of the work that you performed commencing in August of 1970 through February, 1971?

A Essentially the work was consulting work. That role changed during that period of time.

In August, September, October it was fairly direct consulting work. Newburger Loeb had a number of problems and I was involved in attempting to determine and implement solutions to those problems.

In November, 1970, Mr. Kayne decided to resign as the managing partner of Newburger Loeb and ultimately to returr to California. At that time I was asked if I was interested in continuing to try to solve the problems that Newburger Loeb had and to try to turn the company around, put it on a profitab basis, and I said yes, I was interested in doing that.

The discussions continued and it was decided that if it was possible to do and the partners of Newburger Loeb agreed to it, that I would be named as the chief operating officer of Newburger Loeb and would continue to try to turn the company around.

Sometime prior to that some discussions had been had about the possibility of forming a corporation for turning Newburger Loeb into a corporation. At the time of this Novembe role change there was the added thought in my mind that if the company could be turned around, made profitable, if it looked like it could be returned to a viable business entity, then it made sense to try to create a corporation that would be put together out of Newburger Loeb.

So in November I began to -- continuous consulting work but with some tacit added responsibilities of the chief operating officer. I had meetings with the New York Stock Exchange and they were unwilling to accept any kind of direct operational responsibilities from me. And so from November until the time of the transfer, in February, I still operated as a consultant, made recommendations, and to the extent it was necessary to have those recommendations implemented I worked with the partners of Newburger Loeb in implementation of recommendations and continuat - of the business.

Q Now, can you describe the state of the business as you found it of Newburger Loeb when you first began to work there as a consultant?

A The firm was a disaster. It had a number of problems.

Revenues were down substantially. Costs were very high and in some instances out of control. The company had entered into certain business ventures which were ill-advised. It had made arrangements to purchase a basketball team. It had entered into arrangements for new real estate space, the total obligations for which exceeded six million dollars, and had no plans to utilize the space it would have to vacate in order to occupy the new space.

The firm was in the clearning business, and the clearing operations had had a number of problems concerned with them and there was enormous pressure on the capital of Newburger Loeb and many of the capital contributors to the firm had given notice of withdrawal of their capital.

So the firm in all senses was a disaster. Revenues were down, costs were up and out of control, and to the extent there was capital in the company, it was going out.

Q And will you tell the Court and jury what, if anythin you attempted to do to solve those problems?

A We sort of divided up responsibilities and tried to look at the problems as separate projects. And I personally got heavily involved in two specific projects.

The first project was to get the company out of the churning business. If we could negotiate an arrangement to transfer the responsibility for customer accounts to another firm, it would take tremendous pressure off of Newburger Loeb's capital and provide a breathing spell for them.

What we would do would be to make Newburger Loeb into an introducing firm rather than a clearing firm. The capital requirements for an introducing firm are substantially less than those for a clearing firm.

I talked with and negotiated with half a dozen different firms in Wall Street and finally found W.E. Hutton and was able to satisfactorily conclude a clearing arrangement with them, and that clearing arrangement took effect September 30, 1970.

Had we been unable to conclude a satisfactory clearin arrangement, Newburger Loeb could not have lasted until the end of the year. It did not have sufficient capital to do it becaus of the greater capital requirements that there were, and it was difficult to do that because it was the largest clearing transaction whereby an arrangement for a clearing firm to go out of the clearing business, it was the largest transaction that had ever taken place in Wall Street. It was complicated and difficult to do.

The second special project involved an analysis of the profits and losses of the firm, with particular emphasis on where costs were being incurred in the firm, to take steps to bring those costs under control.

An example might be in communications costs. We found 200 direct lines, telephone lines, that were not being used. We found seven direct telephone lines from Burnham and Company to the floor of the New York Stock Exchange which Newburger Loeb was paying for. We found a direct line to a man who had been dead for two years.

We also found examples of excessive costs and lack of control in other areas.

An example might be the petty cash box. We found that Newburger Loeb had on hand at all times $20,000 in the petty cash box in cash that was operated just with a key and the possession of that key was in many people's hands.

Those two areas consumed the principal portion of my time until the end of October.

jg/1f/193 Risher-Direct

Q During this period up to the end of October -- that's Mr. Muh over there, isn't it?

A Yes, it is.

Q What was he trying to do to solve the problem of Newburger Loeb?

A He undertook special projects in the area of disposing of the basketball team and looking into the real estate and lease related obligations that Newburger Loeb had.

Q What was the problem of the basketball team that you observed at that time?

A In the spring of 1970 Newburger made arrangements with the National Basketball Association to buy a new franchise The new franchise was the Buffalo Braves.

The problems concerned with that was that essentially the deal was a certain amount of front end equity, and, as I reall, it required approximately $750,000 to be put up by Newburger Loeb, and then subsequently another two to three million dollars had to be paid to the National Basketball Association.

Newburger Loeb finished that by borrowing the initial $750,000 from the Marine Midland Bank and then giving notes to the National Basketball Association for the remainder of the obligations.

They had no way, with the loss condition of Newburger

Loeb and the problem of capital, to be able to repay the $750,000, nor did they have any way of making payment on the additional two to three million dollars worth of notes that had to be paid to the National Basketball Association. And as the summer of 1970 began, the team was forming and was going to go into formal operation in the fall of 1970 and the working capital for salaries, for players, coaches, travel expenses and so on began to also erode the already low capital position of Newburger Loeb. This was the problem with the basketball team.

Q And what was done about it?

A In the summer of 1970 a number of things had been tried in an attempt to do something with the basketball team. Initially there had been a plan for a partner of Newburger Loeb, for Newburger Loeb to have a parnter. That partner had dropped out and Newburger Loeb had picked up his share.

Then there were several projects attempted to find another partner or to sell Newburger Loeb's percentage of the team or to get out from under in some way or another. None of those had worked.

Bob Muh went to Buffalo and in cooperation with another of Newburger Loeb's partners, Jim Settel, who was also working in Buffalo and trying to find something to do with the basketball team, they found a buyer, finally, a Mr. Paul Schneider, a local businessman in Buffalo. They entered into negotiations with him and were successful in selling the team sometime in September, I believe, to Mr. Schneider. So Mr. Schneider took Newburger Loeb out of its obligations and the amount of loss to Newburger Loeb was 150 to 200 thousand dollars, as I recall it.

Q Let me just ask you this one question before we recess.

During the period up through October of 1970, did you have any other purpose other than to attempt to solve the problems that you found at Newburger Loeb?

MR. MANDEL: Leading, your Honor.

THE COURT: Yes. I'll sustain that as leading. We'll get to that in the morning.

All right. We stand in recess now, ladies and gentlemen. We have matters that the lawyers are going to take up after you go, which is why we are going to let you go a little early today.

See you ten o'clock in the morning.

(The jury left the courtroom.)

(Adjourned to Friday, July 18, 1975, 10:00 a.m.)

Newburger, Loeb & Company, Inc.

v. 71 Civ. 685

Charles Gross, et al., etc.

New York, New York

July 18, 1975
10:30 a.m.

- - -

(Trial resumed.)

- - -

(In the robing room.)

THE COURT: Now as I understand Rule 39, gentlemen, we have convened here on a question of the waiver of a jury in this case, and as I read Rule 39(a), there having been a demand for a jury and we having proceeded by jury so far, the attorneys of record are parties by an oral stipulation made in open court, and this is the equivalent and entered on the minutes, which is the record, can consent to a trial by the Court sitting without a jury, and with the exception of Mr. Berkowitz, whom we will put on the record afterwards, I take it that at this point it would be appropriate for the attorneys for all of the parties presently here to put that stipulation on the record.

MR. SHAW: Your Honor, it has just occurred to me that although I have the consent of Mr. Risher and the mbbr 2

consent of the corporation, I have not discussed this with Mr. Aixala.

If I could step outside for a few minutes and call Mr. Aixala -- he is not in the courtroom but I know where he is.

MR. GRUTMAN: Can I do this? Why anticipate there will be a difficulty? Let's get the stipulation on the record and then you will ratify it or reaffirm it.

MR. SHAW: Then I will call Mr. Aixala.

THE COURT: The problem is suppose he should say "I don't go along" and we let the jury go?

MR. SHAW: We can't let the jury go or advise them until I have spoken to Mr. Aixala.

MR. MANDEL: I think Mr. Berkowitz should be spoken to, your Honor. I am gravely doubtful.

MR. GRUTMAN: In his case there is a sanction that can be imposed against him.

THE COURT: I don't have any problem with that, Mr. Mandel.

MR. MANDEL: Why don't you begin?

MR. MANDEL: All right. I so stipulate on behalf of my clients, the three defendants herein, Gross, Bleich and Donoghue.

THE COURT: And Gross & Company as well?

MR. MANDEL: And Gross & Company, that is correct, the fourth.

THE COURT: You stipulate to waiver of a jury and that I shall become the trier of the fact?

MR. MANDEL: That is correct.

MR. GRUTMAN: On behalf of Finley, Kumble, we consent to the waiver of a jury and to tria 1 and determination of the issues of act by the Court.

MR.ESTERMAN: On behalf of an additional defendant Robert S. Persky, I too stipulate to waive the jury in this case and the judge decide the questions of fact.

MR. SILFEN: On behalf of additional defendants on counterclaims Fred Kayne, Charles Sloane, and Robert Muh, I also consent on their behalf to the waiver of a trial by jury and and to have Judge Owen become the trier of the fact.

MR. MOSS: On behalf of the general partners I consent to the waiver of the jury in this proceeding.

MR. MANDEL: You better name that.

THE COURT: That includes Mr. Moss, the partnership Newburger, Loeb & Co., is that right?

MR. MOSS: No. I have nine names here.

THE COURT: I am looking at a list here (handing to Mr. Moss).

MR. GRUTMAN:Your Honor, by doing this we are not waiving findings of fact and conclusions of law, are we?

THE COURT: No.

MR. MOSS: On behalf of all these parties.

THE COURT: All right, Mr. Moss is on behalf of Newburger, Loeb & Co., a partnership, Andrew Newburger, Robert L. Newburger, executors of the estate of Leo Stern, Robert L. Stern, Richard D. STern, John F. Settle, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, and the executors of the Estate of Ned D. Frank.

MR. SHAW: In behalf of Newburger, Loeb & Co., Inc., and Paul D. Risher, I hereby waive a jury. However, I must speak with Mr. Aixala before I can bind him to this waiver.

I am going to do that right now.

THE COURT: As to Lawrence Berkowitz, who is appearing pro se, and is, as far as I know, presently in California, and is absent, he had a conversation with the Court through my law clerks before the trial in which he stated that he would be absent from time to time, and was advised that this absence carried with it certain perils implicit upon that; and therefore, I feel it appropriate that this action can be takenin his absence given the fact that it is only by sufferance of the Court that he is permitted to conduct himself in this fashion, and that a default judgment could have been taken against him for failure to appear in the first place; so I am going to deem that he is estopped from opposing the action that the parties want to take here today.

(Discussion off the record.)

(In open court; jury present.)

THE COURT: Now, Mr. Birnbaum, add to the record on Mr. Shaw's statement to me that Aixala joins in the possession that Mr. Shaw's other clients have taken.

Ladies and gentlemen, I have an announcement to make to you, which may come as a relief and a disappointment perhaps at the same time.

Given the fact that the parties are unable really to state how much longer this case is going to go, given their concern that you have served far beyond anything that you were advised could be the outer limits when you began, and given the fact that we really are unable to determine as of this point definitely what the outer limits are, and aware that this causes personal problems in certain areas, the parties have determined that from henceforth they have designated me to do the trying of the fact. In other words, they have agreed that you may be excused from further service, and the duties that you would have performed will hereafter devolve upon me.

Therefore, as I say, it is my duty to advise you this morning that I am going to excuse you. I am doing that with a deep appreciation on my behalf and on behalf of all counsel for the time that you put in, the careful attention that you have all given to the evidence as it has gone along. We are all very grateful for that, and you have really served magnificently as jurors. However, it is obvious that it would be inappropriate to continue to demand that you serve further, and for that reason the parties have consented that you be excused and that I carry on as the trier of the fact.

So with the deep thanks of the Court, and with the thanks of all counsel, the deep thanks of all counsel and their parties, it is my duty to excuse you; and you are excused.

JUROR NO. 2: This is the wisest decision possible.

THE COURT: Thank you very much for the time you have put in, your attention.

(The jury left the courtroom.)

THE COURT: Does that convey what everybody would want to say?

MR. GRUTMAN: Yes, your Honor.

Your Honor, I have a statement to make for the mbbr 7

record if I may which I feel I should.

During the course of argument yesterday, your Honor asked me a legal question as to whether or not it was the position of Finley, Kumble that the law firm's legal posture in the case was congruent in all respects with those of Mr. Persky, and my recollection in answering that question was I thought that that was so.

Now, I would like the record to reflect that I may have erred in that respect, and I don't want to have a quadruple Z effect on my having stated that during the argument yesterday, it may later develop, and we may have some authority for your Honor to consider if there is a difference.

THE COURT: Well, the word congruent, I don't think it is the congruent idea so much as it being bound by. Congruent indicates an identicalness in interest which I think is a little bit -- possibly a little bit different.

MR. GRUTMAN: I understand. It's those differences which concern me if they develop.

THE COURT: Well, you take such legal position and urge it upon me as you feel appropriate as we go along.

MR. GRUTMAN: Very well, thank you, Judge.

renewed at this point. All right?

Mr. Risher.

PAUL RISHER, resumed:

DIRECT EXAMINATION (Continued)

BY MR. SHAW:

Q Mr. Risher, I believe that when we recessed yesterday, you were telling us about the period prior to October of 1970, and various activities upon your part in an effort to correct certain problems which you observed in the partnership Newburger, Loeb, and I believe that you indicated to us in substance up to the point where we were what you observed and what was done insofar as the basketball team, but I don't believe that you had told us what, if anything, was done with respect tothe leases. Can we pick up at that point?

A Yes. As I indicated yesterday, I was working on a number of things, and in particular, on getting out of the clearing arrangements and cost control. Rubert Muh was working on getting rid of selling the basketball team, and looking at the lease picture, I had gone where the leases were, what the terms of the leases were, and trying to develop ways to get out of those leases and put of the commitments that the firm had, because in many cases they were excessive and involved vacant space that the firm was carrying.

Q Did you make an analysis with respect to the size of square footage involved under the leases [illegible] what was required and needed for the operation of the partnership?

A I did not, but I believe Bob Muh did.

Q And was something done with respect to any of these leases?

A The most important lease problem had to do with the space at One New York Plaza. It is my recollection that the arrangements there were that the firm was to move in in February of 1971. There was 20,000 square feet under lease at a rate of approximately $15 a square foot, for 20 years, or in total, a $6 million obligation.

Essentially, the operations that would have moved there were contained in the 8th and 9th floors of 5 Hanover Square, and upon making that move, no arrangements had been made for subletting or getting out of the obligation at 5 Hanover Square.

So beginning in February, the firm was going to have a new $300,000 a year obligation, and in a real estate market which made it difficult, if not impossible, to sublet any of the excess space.

So Mr.Muh developed an analysis of this, and ultimately Fred Kayne and Ned Frank negotiated with the landlord at One New York Plaza, Mr. Sol Atlas, and both Newburger, Loeb's way out of that lease for about $400,000.

Q Had that lease been executed prior to the time that you came to Newburger, Loeb?

A Yes, it had.

MR. SHAW: And Mr. Mandel, can we stipulate that that lease was executed some time in September of 1969?

MR.MANDEL: '66?

MR. SHAW: '69.

Q When was the settlement made with Mr. Atlas approximately?

A My recollection has to be approximate, but I think it was some time in October.

Q 1970?

A Yes, sir.

THE COURT: '71?

THE WITNESS: 1970.

THE COURT: '70?

THE WITNESS: Yes, sir.

Q Again directing your attention to the period prior to October 1970, have you substantially stated the problems that you observed and what you and Mr. Muh attempted to do to resolve these problems, or are there other major areas of problems that you detected?

A Well, there were a number of areas, but thus far I have talked only about the major ones, and I guess I should particularly say that about the leases.

I have talked mainly about the problems with the One New York Plaza lease, but there were other problems of vacant and unutilized space as well, and that one was just so large in relation to some of the others, that I focused on it, but indeed there were other lease problems as well.

MR. MANDEL: Excuse me, Mr. Shaw.

Your Honor, I don't really see that the problems, the general problems of Newburger, Loeb at this point and what Mr. Risher did or didn't do to solve them are relevant to issues of this case. In the interest of saving time, I make an objection.

MR. SHAW: I think, your Honor, that it is relevant on the issue of whether Mr. Risher's motive in becoming involved with the partnership was to steal it from Mr. Gross or to attempt to solve problems, avoid bankruptcy, reorganization, bring in additional capital, cut down expenses, increase income, whether, in other words, he was a member of the conspiracies to hurt or a salvage and rescue operation.

THE COURT: Is there a compromise area in between your positions? In other words --

MR. SHAW: I am not going to ask that many questions about it, your Honor, but I want to make it quite clear that this was the motive rather than a conspiratorial purpose.

THE COURT: I appreciate what you are offering it for.

Go ahead.

Q Did there come a time when there was any conversation between you and any other person with respect to the possibility of the acquisition of an interest or some participation in Newburger, Loeb?

A Yes.

Q When was that discussed for the first time?

A Approximately September 1970.

Q And with whom did you have that discussion?

A With Fred Kayne, and Ned Frank initially.

Q And where was the conversation?

A I don't really remember, and it was a conversation that took place more than once, and in different places, and I don't remember a precise beginning to the conversation.

Q Can you tell the Court what the substance of the conversation was?

A Yes. Mr. Kayne was interested in changing the form of Newburger, Loeb's organization to a corporation from a partnership. He made a proposal to the partnership to do that. Included in that would have been new equity owners and new operating officers of the company, and I was to be included or it was open for consideration for me to bincluded as an officer and as an equity owner in the reorganized company.

Q When you are referring to a proposal, are you referring to what's been marked Kayne's Exhibit H?

(Document handed to the witness.)

A Yes, s ir.

Q Were there further conversations or anything done subsequent to the conversation between you and Mr. Kayne and Mr. Frank in September of 1970?

A The proposal that you just showed me was made to the partnership. My recollection is that after a very brief conversation by the partnership, that proposal was dropped and if we call that an alternative, no further work was ever done on that alternative and that was the end of it.

Q There has been testimony with respect to a meeting at Finley, Kumble at which Mr. Kayne delivered so-called prepared remarks, and I believe that meeting was on or about August 23rd or 24th of 1970. Did you attend that meeting?

A No, I did not.

Q Subsequent to the rejection of Mr. Kayne's proposal, whatever is set forth in exhibit, Kayne Exhibit H, were there any further conversations between you and Mr. Kayne or any person with respect to any effort to obtain an interest in the partnership?

A As I think I testified yesterday, in November, Mr. Kayne made a decision to resign as the managing partner of the firm, return to California.

I was asked if I had any interest in trying to continue to solve problems in Newburger, Loeb, and if I had any interest in trying to arrange a takeover.

MR. MANDEL: Excuse me. Asked by whom? May I interrupt to say asked by whom?

THE WITNESS: The meeting -- if I may answer.

THE COURT: Yes, please do.

THE WITNESS: The meeting where this occurred was in Mr. Persky's office and it was a meeting between Mr. Persky, Mr. Kayne, Mr.Muh, and me.

In that meeting. I said yes, I was so interested; Mr. Kayne was not to be an equity owner, he was to merely be an employee of the firm, and shortly thereafter we proceeded with that plan, Mr. Kayne went to the Caribbean and ultimately returned to California and I continued to work on solving the problems that there were in the company, and ultimately, developed arrangements to enter into the transactions that's -- of February 11th.

Q All right.

Now, during the period subsequent to October 1970, can you tell the Court what you did in an effort to solve the problems that the company had?

A During those days it seemed attention was focused on the most important problem, and in August as I received the most important problems were basketball team and real estate and clearing. Ultimately we sold the basketball team, ultimately we made an arrangement to negotiate our way out of the One New York Plaza lease, and we entered into an arrangement for W. Hutton to do the clearing operations.

Shortly after the November meeting that I referred to, we had a meeting with the New York Stock Exchange. The New York Stock Exchange reiterated --

Q Who at the New York Stock Exchange did you meet with?

A We met with Mr. William Dilger and I believe another gentleman but I don't recall his name.

And certain of the partners of Newburger, Loeb and I met with the Stock Exchange, and they reiterated that Newburger, Loeb was near to being out of business and the main reason at that time in addition to the enormous operating losses, normally in excess of $100,000 a month, was the problem of capital withdrawals. So the new major problem that we had to solve was capital withdrawals. A number of limited partners and subordinated lenders had given notice that they were going to withdraw their capital and in fact certain of those withdrawals had been paid; but it was clear looking at the numbers that if those withdrawals continued, that the firm would quickly be out of capital ratio and therefore suspended from the New York Stock Exchange and would have to liquidate.

Q Did there come a time when Newburger, Loeb received Plaintiffs' Exhibit 1 in evidence which I believe is the letter dated November 17, 1970, from the New York Stock Exchange to Newburger, Loeb. Here it is (handing to witness).

Do you remember that letter?

A Yes, I do.

Q And the meeting that you have just referred to with the New York Stock Exchange, was that before or after the receipt of this letter?

A That was before the receipt of this leter, and, in fact, the first paragraph of this letter confirms the conference on the previous day.

Q November 16th?

A Yes, sir.

Q Does the letter, Exhibit 1, accurately set forth the state of the financial affairs of Newburger, Loeb as or about that period?

A Yes, it does.

Q Will you describe to the Court in substance what the state of the financial affairs were? Just be very brief.

A The state of the affairs were that the company was losing more than $100,000 a month. There was no hope that that loss could be stopped quickly. It was going to take a period of time to stop the loss; and there were capital withdrawals, notices already in hand, my best recollection is of about a million dollars, but it is spelled out precisely in the letter, and these were notices from limited partners and subordinated lenders that they were planning to withdraw their capital, so therefore the firm was going to go out of ratio and when it was out of ratio it would be suspended and since its business was a brokerage business that meant it was out of business and had no alternative but to liquidate.

THE COURT: Mr. Risher, does Rule 325 apply to a non-clearing firm?

THE WITNESS: Yes, sir, it does.

THE COURT: In the same ratio?

THE WITNESS: Yes, sir, and that is spelled out in that letter that we are going to be out of ratio with regard to 325.

Q The effect of changing from a clearing firm, hwoever, is to make additional capital available?

A Right. At the time we received that letter, had we still then been in the clearing business, we would have been out of business because we would have violated the ratio substantially before that.

Q When for the first time was there a meeting with the limited partners or the general partners en masse to discuss these problems?

A Within days after the receipt of that letter. It was my --

Q Just stop for a second.

Tell us where the meeting took place, tell us approximately when the meeting took place, and generally describe who was present.

A The meeting took place in the offices of Finley, Kumble, and those who were present were the limited partners, the general partners, and there were a number of counsel and advisors to the general and limited partners who were also present at that meeting. There has been testimony here that there were subordinated lenders at that meeting but I don't believe that's the case unless there was the coincidence of some individuals who were both limited partners and subordinated lenders.

Q This was the first such en masse meeting?

A Yes. Well, there had been a meeting, a large meeting that there's been testimony about here of general partners but it was the first time that the limited partners were ever at a meeting that I am aware of.

Q Now will you tell the Court what occurred at this meeting.

A The purpose of the meeting was to tell the limited partners the problems of the firm, to ask them not to withdraw their capital.

It was the first time that they had ever received, as many of them indicated, any financial information on the firm; and as I recall it I took to the meeting certain projections of capital withdrawals and cash flows that essentially indicated the same information that's conveyed in the New York Stock Exchange letter.

Q Who prepared those projections and cash flow analyses?

A I did.

Q And upon what basis did you prepare those projections and analyses?

A The books and records of the firm, and the withdrawal notices that I new were in hand.

Q Who furnished the books and records of the firm to you?

A At that point in time, I am not certain as to who the controller of Newburger, Loeb was.

In August when we arrived at Newburger, Loeb the controller was Mr. John Wagnes. He resigned, went to Bache & Company. For a short period of time, Mr. Muh and I made an arrangement with a gentleman by the name of Henry Montgomery to come in and pitch in and help with the problems of Newburger, Loeb. He is a certified public accountant and is today the financial vice president of a large semi-conductor company on the West Coast. He was there for only about four or five weeks, as I recall, and when he left we were able to hire a gentleman by the name of Aaron Weiss, but the precise dates for each of those people is not fixed in my mind, so it could have been any one of the three.

Q And so the information that you had you got from whoever the controller was, correct?

A Yes.

Q What else occurred at the meeting?

A Well, we passed out the financial information, and as you can imagine, there was a considerable amount of shock on the part of many people who had been anticipating getting their money back and had no inking or any idea of Newburger, Loeb's problems.

And oneof the important things that occurred was when this information was passed out Mr. Quarte, one of the limited partners who had --

Q Did you say Quarte?

A Quarte.

Q Q-u-a-r-t-e, correct?

A Right. Who had approximately a $500,000 limited partnership interest represented by shares in Owens Illinois Corporation, Mr. Quarte said "That can't be, I have stock, Owens Illinois stock in the company and that has got to be returned to me."

And it was my sad duty to have to tell Mr. Quarte that his stock had been sold the day previously in order to meet the obligations of Newburger, Loeb, whereupon all the other limited partners looked with concern to Mr. Quarte and I had the sad duty to tell them that they shouldn't be so concerned about Mr. Quarte because we had had to sell the securities belong to all the limited partners.

Q To pay general creditors?

A Yes.

Q And was that in accordance with the terms of their subordination agreement?

A Yes.

MR. GRUTMAN: Quarte was a limited partner or subordinated lender?

THE WITNESS: I answered Mr. Shaw's question, in substance it is correct. Mr. Quarte was a limited partner and the sale of securities was in keeping with the terms of the limited partnership agreement.

MR. SHAW: I understand.

THE WITNESS: Which permitted tha- those securities could be sold, assigned, and in fact were the firm's to use as their own.

Q What else occurred at this meeting?

A The net result of the meeting was that we got agreement from the limited partners not to withdraw their capital they had had time to think and examine the information that I gave to them, discuss the problems with their advisers, and so the result of the meeting was that they entered into an agreement, which agreement was given to the Exchange, to temporarily postpone their withdrawals of capital.

Q Can you recall if Mr. Gross was present at this meeting?

A I don't believe he was.

Q Can you recall if Miss Bleich was present at this meeting?

A Yes, I think Miss Bleich was there.

Q Do you know if Mr. Silverman was present at this meeting?

A I don't think Mr. Silverman was at the meeting but I think a member of Mr.Silverman's firm, Mr. Shack, was at the meeting.

Q Was there any further conversation at this meeting of November with respect to anything that could be done or would be done with respect to attempting to resolve the problems that were facing Newburger, Loeb at that point?

A Well, as I have done here in court, I outlined for the people at the meeting the problems that Newburger, Loeb had had and what had been done to solve those problems; and what work was continuing in the efforts to solve Newburger, Loeb's problems.

Q At that point was there any discussion with respect to any efforts to introduce new capital into the operation?

A I don't recall any discussions at that meeting about introducing new capital. The main purpose of that meeting was to accomplish the discontinuation of the withdrawal of capital.

Q When for the first time was the question of new capital discussed?

A Subsequent to that meeting, Mr. Muh and I made a proposal to the partnership, Newburger, Loeb, to reorganize it into a corporation and a --

MR. MANDEL: Excuse me. Can I interrupt? How long subsequently?

MR. SHAW: I will bring that out, Mr. Mandel.

Q When was that proposal made and where was the proposal made?

A I don't know the precise day but the proposal is in writing and it is probably dated and I am sure it is here in court somewhere.

Q And who was the writing delivered to?

A Initially the writing was delivered to the Executive Committee of the partnership, as best I recall.

Q Yes?

A That committee rejected the proposal.

Q I show you this document and I ask you if this is the proposal?

A Yes, it is. Unfortunately, I notice that it is not dated but I can fix a date, approximate date, and it was between the meeting that we discussed and December 10th, which was the next major meeting of limited partners.

Q Which was held where?

A That was held at the offices of Stroock, Stroock & Lavan.

MR. SHAW: May this be marked.

(Plaintiffs' Exhibit 122 was marked for identification.)

MR. SHAW: I offer this in evidence.

MR. MANDEL: No bojection.

(Plaintiffs' Exhibit 122 was received in evidence.)

Q Subsequent to the preparation of this document, you attended a meeting at Stroock, Stroock & Lavan?

A Yes.

Q And we have had testimonywith respect to who was present.

Just tell us in substance what you can recall occurred at this meeting.

MR. MANDEL: Can we fix a date?

MR. SHAW: December 10th.

MR.MANDEL: Is that December 10th?

A As I indicated, the Executive Committee of the partnership rejected that proposal; and at the same time they decided that they wanted to terminate the services of Risher, Muh.

Q At this point who composed the Executive Committee of Newburger, Loeb?

A I think Robert Newburger, Andrew Newburger, Robert Stern, perhaps Richard Stern, and perhaps Leo Stern.

Q Just let me go back for a moment. As of this point, December 10, 1970, had you met Charles Gross?

A Yes.

Q And when had you first met Charles Gross?

A In August, 1970, I think.

Q And was that at the offices of Newburger, Loeb?

A I think the first time I ever met Mr. Gross was in Mr. Kayne's room at the Navarro.

Q And did there come a time when you met Mr. Gross at the offices of Newburger, Loeb?

A I think so but our contact was certainly limited.

Q And did there come a time when Mr. Gross was no longer at the offices of Newburger, Loeb?

A Yes.

Q When was that, approximately?

A Some time in August 1970.

Q And is it fair to say that subsequent to August of 1970, you did not see him at the premises of Newburger, Loeb?

A That is correct.

Q After August of 1970, when for the first time did you next meet Mr. Gross or see him or be in the same room with him?

A The next recollection that I have is in a meeting in Mr. Mandel's office in January 15, 1971.

Q Can you tell us the substance of the conversation at the meeting on December 10th of 1970 at the offices of STroock, Stroock & Lavan?

A October. I am sorry I didn't answer that a while ago and I sort of developed a setting for it in that the general partners had asked us to terminate our services, and in substance the reason for that was that we were not too popular after the meeting with the limited partners when we had openly told everyone what the problems of Newburger, Loeb was. As a result of that, the general partners were under substantial pressure.

The general partners had arranged for another consultant, a man by the name of Gutman, so at the Devember 10th meeting, the meeting began by Mr. Freund, who was at that point in time the counsel for Robert and Andrew Newburger, I believe, and perhaps the counsel for the partnership -- that I don't recall -- Mr. Freund got up and asked if Mr. Muh and I would please leave the meeting, and in attendance at the meeting were again general partners and their representatives, limited partners and advisers and their representatives.

Mr. Steefel said to Mr. Freund and Mr. Muh and I got up to leave the meeting and Mr. Steefel said to Mr. Freund, "No, Mr. Freund, Mr. Risher and Mr. Muh are here at our invitation. We'd like them to stay."

I sat next to Arthur Silverman, as I recall. He had the sme bad seat I did, and the meeting went on for about a hour or so. Mr. Grutman made a presentation, which was very similar to the presentation that had been made at the prior meeting. It discussed problems facing the firm, what had been done to solve those problems, and what was going to continue to be done, and the capital problems that the firm had with withdrawals.

Mr.Grutman went on to focus attention on a proposal that the general partners were making for continuation of the firm and getting the firm to move forward.

After thatpresentation, Mr. Steefel stood up and asked everyone to please leave the meeting who was not a limited partner or representing a limited partner.

All the general partners left the meeting. Mr. Gutman let the meeting. Mr. Freund, as I recall, left the meeting, Mr. Muh and I left the meeting; and as we left we said goodby because as far as we were concerned our services had been terminated by the firm, we had made a proposal, and we had renewed that proposal and directed that proposal to the limited partners prior to that December 10th meeting.

Q In that document that was just marked?

A Yes. And there is a letter of transmittal somewhere in the courtroom transmitting that and telling limited partners that we had been terminated.

Mr. Steefel asked us to please not leave the premises, to stay on the premises; so we did.

We waited in the reception area. And after a period of time, and I think the period of time was about 45 minutes to an hour, Mr. Steefel asked us to -- someone came out and asked us to please come back into the meeting, and there were just partners and their representatives there.

Mr. Steefel said, "The general partners have lost all of their money, they have no capital at risk in this firm any longer and the limited partners are in control."

Q Are in what?

A "The limited partners are in control. We have decided that we would like to accept your proposal. However" -- and as I recall our original propsal provided that they got paid off over a long period of time at a rate of 50 cents on the dollar for their limited partnership interest, Mr. Steefel said you have to undertake the obligation to pay uss off 100 cents on the dollars, and you have to raise a million dollars," and as I recall, we had two or three days, perhaps just a weekend to raise a million dollars.

He said "If you will agree to obligate the company to pay uss off a hundred cents on the dollar, and can raise a million dollars, then we will go forward with your proposal."

Q All right, now, Mr. Steefel, you say, indicated that the general partners had had a loss of their capital; and the limited partners were then in control. As of that point are you familiar with what the state of the finances of Newburger, Loeb was?

A Yes.

Q And will you describe what the state of the finances of the company was at that point as it related to what Mr. Steefel said?

A At that point in time, there was showing on the books and records of the firm indications that the general partners had approximately a million dollars in capital, the limited partners had approximately $2.2 million in capital, and the subordinated lenders had about a million dollars in capital, 1,100,000 in capital.

However, at that point in time --

MR. MANDEL: Excuse me. What was the number you gave for the subordinated?

THE WITNESS: A million.

A However, at that point in time, certain costs that we knew for certain had not yet been booked. First there was the cost of the settlement with Mr. Atlas, and that was four hundred and some thousand dollars; second was a loss on the basketball team. My recollection is that was 150 to $200,000.

Third was possible loss on conversion to a non-clearing firm, and transferred approximately $75 million in securities and thousands of positions to W.E. Hutton.

And all of the operating losses to that or that we could see coming to that point. So clearly the million dollars of capital of the general partners had been eliminated, and that had been eliminated on a going-business basis; and as people looked at the balance sheet, and made estimates of what assets would bring on liquidation, and what would happen to the liabilities on liquidation, they realized that the limited partners --

MR. MANDEL: Excuse me, I object to the statement that people looked and they realized.

THE COURT: Yes, sustained. Strike it out.

MR. SHAW: Yes, strike it out. That's all right.

Q What, if anything, did you or Mr. Muh or anybody say in response to what you indicate Mr. Steefel said at this meeting of December 10th, at Stroock, Stroock & Lavan?

A I said that it was unfair to the corporation to be expected to pay the limited partners back 100 cents on the dollar, since it was my opinion then and now that that money had been lost and was already gone; but I agreed to undertake the obligation and make an effort to do it. I asked for ten years to repay it. Ultimately we negotiated to five years, which I thought was too short a time and indicated so too.

Q Was there any discussion at this meeting with respect to subordinated lenders?

A I don't know whether there was at that meeting or not but it was then readily apparent that we had to go through the same procedure with the subordinated lenders.

That is call them in, give them the information, and tell them the condition of the company, and attempt to persuade them not to withdraw their capital.

Q And subsequently, was there a meeting attended by the various subordinated lenders?

A Yes, there was.

Q When was that meeting?

A I believe that was around December 17th.

Q All right.

Now let us stop just for a second. As of this point, had you had any conversations with Mr. Persky regarding a man by the name of Aixala?

A Yes.

Q When for the first time time was the name Axiala mentioned to you?

A Probably in the first few days of December.

Q Who mentioned this name to you?

A Mr. Persky did.

Q And can you recall where this conversation took place?

A No, I cannot.

Q Can you recall the substance --

MR. MANDEL: Excuse me. You said the first few days of December?

Q Can you recall the substance of the conversation?

A The best recollection I have of the initial conversation, and I am not sure that Mr. Aixala's name was mentioned at that time, but Mr. Persky mentioned to me that he knew someone, and I think he said Bacardi, that had some associations with Bacardi, and it would be perhaps of interest to that person to make an investment in a brokerage firm.

The conversation probably consumed less than a minute.

Q Thereafter, did you have any further conversations with Mr. Persky regarding Mr. Aixala?

A After the December 10th meeting, Mr. Muh and I sort of looked at one another and said "Okay, where are we going to find a million dollars?"

And we attempted to raise that money from certain other sources that we had; got nowhere.

Q Such as?

A The venture capital operation of City Bank, as I recall, a venture capital company by the name of Gunwyn Associates, and I believe that we talked to one or two individuals who had substantial net worth, but at that period of time Wall Street was in very bad shape, and there was very, very bad publicity about the industry as a while, and no one was interested in making any sort of an investment of any sort in a brokerage firm.

We then said to Mr. Persky, "The only possibility that we have of raising a million dollars is through the gentleman that you mentioned."

Q Prior to the date of the meeting with the subordinated lenders, was there any further conversation between you and Mr. Persky or anybody about Mr. Aixala?

MR. MANDEL: Excuse me, Mr. Shaw.

Can you fix the dates more precisely?

MR. SHAW: The company subordinated lenders was December 17th.

MR. MANDEL: You are saying between December 10th and December 17th?

MR. SHAW: Yes.

A I don't recall any specific conversations that took place during that period of time.

Q All right.

Now, as of the date when there was a meeting with the subordinated lenders, had any definite commitment upon Aixala's part been communicated to you by Mr. Persky or any person?

A No.

What we represented to the limited partners was that we thought we could raise a million dollars.

Q When youhad the meeting with the limited partners, did you have in mind Aixala as the particular source?

A No; but I noticed in Mr. Silverman's notes, which are here as an exhibit, that the name Bacardi is written in his notes, and I assume from that that I must have mentioned the name Bacardi as a possible source at that December 10th meeting.

Q But you have no recollection?

A I have no recollection, no.

Q Can you tell us what occurred at the meeting with the subordinated lenders? First of all, tell us where the meeting took place, and tell us generally who was present.

A The initial meeting with the subordinated lenders took place at the offices of Stroock, Stroock and Lanvan; and certain of the limited partners and counsel for the limited partners were again at this meeting.

And the meeting was very similar to the initial meeting with the limited partners. We explained the condition of the firm and what was being done to improve those conditions. Fortunately none of the subordinated lenders' securities had been sold, so we didn't have to give them the bad news that all of the securities that they thought they owned had been sold.

Their reaction was very similar to the limited prtners', one of shock. As I recall it, at the initial meeting there was Mr. Albert Dworkin, I think Mr. Bialkin was at the initial meeting, I think Mrs.Newborg had a dual position in Newburger, Loeb. She was both a limited partner and a subordinated lender. I believe Shirley Newburger who was the wife of Mr. Andrew Newburger was at that meeting, and she was s subordinated lender.

Q What, if anything, was said with respect to the position of the subordinated lenders in Newburger, Loeb at that point?

A We said the same things that we had said to the limited partners. "You have given notices for capital withdrawal. If capital withdrawals continue from this company, the company will violate Rule 325 and as a result will have to liquidate; and you can make your own estimates as to how you will come out, how your interest will fare in a liquidation."

Q And what if anything, was said in response to that?

A Well, in the initial meeting with the subordinated lenders, like with the limited partners, there was shock. People did not realize that their capital was so substantially at risk, they did not realize that the firm had been doing so badly, they had never had any information about the firm.

Q Was anything agreed upon at this meeting?

A No. There is one thing I should add that occurred at the meeting. The subordinated lenders, in order to confirm what we were talking about, decided that they wanted to call the New York Stock Exchange. I think a representative of the New York Stock Exchange had attended the initial meetings with limited partners but for some reason there was no representative of the New York Stock Exchange at this meeting.

One of the counsel for the subordinated lenders placed a call to the Exchange, and the Exchange confirmed that the company was in trouble, and that there had been this November 17th letter, and that things were difficult; but then the Exchange surprised all of us by indicating to the subordinated lenders that they did not find Mr. Muh and me acceptable managers of the company, and their basis for saying this was that we were hot experienced in the securities industry.

So that also occurred.

Q After the meeting with the subordinated lenders --

THE COURT: Mr. Risher, just so I understand this, during the course of the meeting somebody called the Exchange?

THE WITNESS: Yes, sir.

The court; Who called, if you know?

THE WITNESS: I do not remember who placed the call. My best guess is that it was Mr. Bialkin because he had had substantial dealings with the Exchange and knew a number of people there, and I believe -- I know he called Mr. Dilger. There isno question in my mind as to who he called and my best guess is that it was Mr. Bialkin doing the calling.

THE COURT: And he, in the course of this, Mr. Dilger somehow said to him that you and Muh were not acceptable?

THE WITNESS: From time to time the New York Stock Exchange has a tremendous capacity for surprise, and that was one of those times; and so it was my and Mr. Muh's turn to be shocked.

THE COURT: Because Mr. Bialkin got off the phone, I take it, or whoever it was, and said something to you. What did he say?

THE WITNESS: He came back or whoever it was came back, the subordinated lenders came back and they said "You have represented to us that you are the new management, and that this thing can go forward. We have just talked to the Exchange, and the Exchange says you are not acceptable as new management."

THE COURT: I see.

THE WITNESS: Which came as a very unpleasant surprise.

Q For what reason?

THE COURT: His lack of experience.

Q Lack of experience?

A Lack of experience and as we learned during that period of time the New York Stock Exchange changed their minds from time to time. Sometimes they would say everything was fine and we were acceptable and at other times --

THE COURT: Let us not get into that.

Q Let us just jump ahead.

THE COURT: Let's stick with this one meeting.

Q Subsequently did you file a Form AD 11 or AD 12 with the New York Stock Exchange?

A Yes, I did.

Q And subsequently did you become an allied member of the New York Stock Exchange?

A Yes, and the only time in the history of the New York Stock Exchange Mr. Muh and I were required to take and pass the allied members' examination prior to the completion of this transaction. We took an examination for a company that was not then operating.

Q And did the New York Stock Exchange, prior to the time when the transaction was concluded, and before you had taken the test and filed the form, in fact indicated to you that they believed that you were not sufficiently experienced?

A By the time that the transaction was concluded, they had agreed that we were experienced, but they made certain conditions to that.

Q All right.

Did they communicate those conditions to you?

A Yes, they did.

Q When were those conditions communicated to you approximately?

A During the period of time from about December 17th until closing on February 11th.

Q And in addition to the conditions that you have told us about, were there any further conditions?

A Yes, the conditions were these:

The first condition was that Fred Kayne had to become a partner of the management of the company, and that he had to have an equivalent amount of shares to Mr. Muh and me.

A condition also was that the company be operated by an executive committee, and the Exchange required that Mr. Kayne be on that executive committee, that Mr. Sloane be on that executive committee, and that Mr. Berkowitz be on that executive committee, because they were all experienced in the securities industry.

I was not in favor of that method of operation, but in order to meet the Exchange requirements, we had to do that.

I should also add there were other conditions about minimum amount of capital that they would permit for the corporation, the kinds of underwritings that we would be allowed to participate in, and the kind of trading positions we would be allowed to carry. There is in the court somewhere a writing on that that spells out all of those conditions precisely.

Q I will get to that later. Subsequent to the meeting with the various subordinated lenders at Stroock & Stroock & Lavan was there any further conversation between you and Mr. Persky with respect to Mr. Aixala?

A Yes.

Q What did Mr. Persky say to you?

A I don't recall it in the way of a specific conversation. Those were harried and hectic periods of time. Things were going on at all hours of the day and night, but in substance during that period of time he conveyed to me what he thought was an equitable arrangement for Mr. Aixala.

Q And this is between December 17th and December 31st of 1970, correct?

A Yes.

Q What did he say?

A The main elements of the arrangements with Mr. Aixala were to be these:

One, that his money in the form of Bacardi stock should be put up in as secure a position as it possibly could.

Two, that Mr. Aixala should receive 20 percent of the equity in the company.

Three, that Mr. Aixala should be paid for this subordinated loan a rate of interest of 4 percent of the market value of the securities that were included in the subordinated loan. Those were the principal arrangements as far as Mr. Aixala was concerned.

Q Thereafter, did you attend a meeting on December 31, 1970, at the offices of Finley, Kumble?

A I think the meeting that you are referring to was on December 30th, and it extended through the night and into the morning of December 31st.

Q Before we get to that meeting, during this period of time, did you become familiar in any way with the claim, if any, of Newburger, Loeb against a customer by the name of Buckley and his wife Mary Buckley?

A Yes.

Q When for the first time was that account referred to you?

A To my best recollection, some time in November 1970.

Q With whom did you first have any conversation regarding that account?

A My probable first contact with that account came from trying to solve Newburger, Loeb's problems. One of Newburger, Loeb's assets was receivables from customers. In the case of the Buckley account it was only a partially secured receivable. There were a number of other customers, although the Buckley's receivable was the largest one, and we endeavored to make collection from every single one of those customers if we could.

We instituted suit, we telephone people, we wrote letters, we did everything we could to bring as much money into the doors of Newburger, Loeb as we possibly could.

So my initial contact, recognition of the Buckleys was in looking at these receivables that were due to Newburger, Loeb.

Q What occurred in connection with respect to the Buckley account?

A My next recollection of the Buckley account was learning from Robert Persky, who had been assigned some of these collection problems in particular the Buckley one, that there was some sort of offer of settlement from the Buckleys.

Q Can you recall when that was, approximately?

A My best guess is December 1970.

Q Is that a memorandum that you wrote? I show you Exhibit A in evidence.

A Yes.

Q And is this a memorandum which you received? I show you B in evidence.

A Yes.

MR. MANDEL: Excuse me, Mr. Shaw, what is he looking at now.

MR. ESTERMAN: Finley, Kumble Exhibits A and B.

Q Were you aware that the Buckley claim had been settled?

A Yes, I ultimately become aware that it was settled.

Q And at the time that the claim was settled --

MR. MANDEL: Can we fix a date when he became aware? He said approximately.

Q Did you become aware as of the date set forth in those documents?

A On December 9th I wrote Mr. Newburger, and told him that Mr. Persky was about to settle the Buckley claim; and that if Mr. Newburger had any thoughts or wanted to change the arrangements in any fashion, he should talk with Mr. Persky.

So it was subsequent to December 9th but I do not know, do not recall the precise day.

Q Were you instrumental in any way in the settlement of that claim?

A I am sure I was.

Q And what was your purpose in settling the claim?

A Well, as in many cases at that time I made snap decisions and it was sort of radical kind of surgery that had to be done at Newburger, Loeb, and my conversation with Berkowitz, which resulted in this memorandum, to the extent I talked about it with Persky, was in the nature of, "Is 50,000 bucks all we can get? Is that the maximum? Can we get it now? We need the money. Let's settle and get going. We have other problems to resolve."

Q Did you have any other purpose?

A No.

Q As at this point, were you aware that Charles Gross, having been the managing partner and a general partner of Newburger, Loeb, had withdrawn?

A Yes.

MR. MANDEL: As of what point?

Q December 1970.

A My frame of reference was December.

Q As of this point, December 1970, Mabel Blecih and Jeanne Donoghue were still limited partners of Newburger, Loeb & Company, correct?

A Yes.

It is my recollection at that point they were probably the only limited partners who had not given a notice of withdrawal. Others had given it and temporarily retracted it but they had never given it initially.

Q Did the settlement of the claim have anything to do with any agreement or pressure to be placed or exerted on Gross, Bleich or Donoghue?

A No, sir.

THE COURT: Mr. Shaw, should we take a recess at this point?

MR. SHAW: That is perfectly fine, your Honor.

(Recess.)

THE COURT: All right, Mr. Shaw, go ahead.

PAUL D. RISHER, resumed.

DIRECT EXAMINATION (Continued)

BY MR. SHAW:

Q I believe you indicated that you were present at the meeting of December 30, 1970. Prior to that time had you had access to and did you furnish to the various people present at the meetings financial statements of the partnership for the preceding months, November of 1970 and October of 1970?

A The answer is yes, and I'd like to add as we talk about meetings, the ones that I am identifying here are the major meetings that occurred. There were numerous other meetings, and sometimes there would be limited partners and sometimes there would be counsel for limited partners, and sometimes the subordinated lenders in various mixtures of limited, general, and subordianted and counsel for all of these people.

MR. SHAW: Your Honor, I am asking counsel for the defendant to give me the exhibits that --

MR. ROTHMAN: Some of the Silverman exhibits were Finley, Kumble exhibits.

MR. ESTERMAN: What are you looking for?

MR. SHAW: The financial statements referred to by Mr. Silfen, specifically the one dated November 27, 1970, the one dated November 30th.

MR. ESTERMAN: That is Finley, Kumble Exhibit P. That is November 27th, 1970.

MR. ROTHMAN: That is correct, it is also O, which is October 31st. There is also N which is also November 27th; and I believe all the Silverman exhibits labeled for Finley, Kumble are in a separate brown envelope.

Q Mr. Risher, I place before you Exhibits Finley N, O and P, as well as Finley Q. Finley Q is marked for identification only. And first directing your attention to the document marked O, is this a document that was used as the basis for conveying information to the various persons present at the meetings that you talked to us about?

A Yes, it was.

Q And I ask you the same question with respect to N.

A Yes, at later meetings when we then had the

November balance sheet available, that was used in various meetings.

Q And I ask you the same question with respect to P.

A Yes, but P is a special kind of exhibit. The initial reason for the preparation of that was to furnish to the New York Stock Exchange the pro forma capitalization of the corporation that was to be admitted to membership. They asked for a pro forma balance sheet, and I believe we also then used that balance sheet subsequently in meetings with the parties to this transaction to show them what the capitalization of the new corporation would look like.

Q Who prepared these exhibits?

A The controller's operation of Newburger, Loeb & Commpany.

Q Were they prepared based on the books and records of the company?

A Yes, they were.

Q Mr. Silverman testified, and you heard his testimony, with respect to an increase in the assets as shown in the financial statement prepared by Peat, Marwick & Mitchell for the period ending December 31, 1970.

Q Do you recall that testimony?

Q Yes, I do.

Q An increase from the assets as shown as of November 27, 1970, correct?

A Yes.

MR. SHAW: May I have the Peat, Marwick financial statement?

Q I place before you the Peat, Marwick financial statement, Exhibit I; Finley, Kumble Exhibit I. Will you explain the reason for the increase?

A Yes, Mr. Silverman testified that he noted a $300,000 increase between the November balance sheet and the Peat, Marwick audited December balance sheet. I believe he also testified that he noted a $600,000 increase in the net worth between the November balance sheet and the unaudited December balance sheet dealing -- let me deal with the $600,000 number.

After that testimony I went back to the books and record of the company to look into why that had happened. There were numerous small reasons, but there were two major reasons.

The first reason was an increase of between -- of about $250,000 as a result of the clean-up with W.E. Hutton in the transfer of clearing operations there.

As I said earlier, that transfer involved about

$75 million worth of securities, thousands of individual certificates and thousands of positions. It is a major financial undertaking and it was the larges of its type ever in Wall Street. And as a result of that there is a substantial amount of clean-up of books and records, and in fact it went on for a number of months into 1971.

The second major item was recoveries from customers and grokers and dealers who owed us money, and as we were cleaning up the books and records of Newburger, Loeb, we would identify people who owed us money and we would make claims, and we would successfully check that money, and indeed we continued to do that until as recently as a year ago. Those two items.

MR. MANDEL: What was the amount of the second item, Mr. Risher?

THE WITNESS: The second item was recoveries.

MR. MANDEL: How much?

MR. SHAW: $600,000.

THE WITNESS: No, how much?

MR. SHAW: I am sorry.

THE WITNESS: I would estimate about over $200,000.

MR. SHAW: I am sorry.

A But that is an estimate and there is difficulty identifying specific comparisons.

A third reason was substantial improvement in the market during the month of December 1970, and of course Newburger, Loeb owned a substantial amount of securities. Those increases are reflecte in the books and records of Newburger, Loeb.

Now, I then went back and found that Mr. Silverman's notes of the December 10th meeting, the notes that he made, indicated that Newburger, Loeb was working on these recoveries and might recover as much as a million dollars. Therefore, it seems to me that he shouldn't have been surprised that we did get $600,000.

Q I place before you Defendants' Exhibit HH and ask you to point out the entry therein that you just referred to.

MR. MANDEL: Do you mind if I come up and look over your shoulder?

MR. SHAW: Look at my copy, if you like.

A It is a combination of entries. On the first page, he says "It was a miracle, the transfer of customer accounts to W.E. Hutton,"and since I arranged it I agree.

He then goes on to say that the cost of the conversion is presently unidentifiable. It involves claims by and against Newburger, Loeb. We didn't know where we were going to come out at that point in time.

Q Just stop for a second.

That's in line --

MR. MANDEL: Is there a copy of it for the Judge?

MR. GRUTMAN: I will give your Honor my copy.

MR. SHAW: Line 11.

Judge, you can use ours (document handed to the Court.)

MR. SHAW: Maybe we will look over the witness' shoulder.

MR. MANDEL: All right.

Q Continue.

Q Just to stay with that for a moment, if you then look at the December 31st certified statement, and I pick that up so it's easy to see an asset, that does say cost of securities purchased by clearing procedure, $220,662. That's that time. Okay?

On the next page of the Exhibit HH, Mr. Silverman's notes say "If Newburger, Loeb remains a viable entity,, there is a substantial recovery potential. The firm trying to search and recover what W.E. Hutton is missing. Search time talkingin terms of $1 million. Optimisitc. Takes time and depends upon continuing name of

Newburger, Loeb. Very important that firm make street collections" that's collections from other brokers and dealers "in the name of Newburger, Loeb."

The meaning is if Newburger, Loeb is out of business the other side of those transactions are -- it is difficult to get them to pay.

The next item says "Also there are claims against Newburger, Loeb that will be discovered, and there is probably an " -- it looks like it says a net to Newburger, Loeb of $200,000 but I think he meant a net against Newburger,Loeb of $200,000. I think put the $200,000 with the million dollars we see the net potential recovery of about $800,000. So the process of making those recoveries that was going on during that period of time also accounted for a substantial portion of that increase.

MR. MANDEL: Excuse me. I'd like to interrupt for a moment. You are saying -- that when Mr. Silverman wrote a net plus of $200,000,you are saying he means a net plus of $800,000. Is that what you are telling us now?

THE WITNESS: No. I am saying those two items are connected. And I am saying that what he meant was that the claims -- he says there are claims against Newburger, Loeb, and I think he is making a estimate of $200,000, and in the preceding paragraph it is claimed for Newburger, Loeb of $1 million.

Q Which nets to $800,000?

A I might add that these notes --

MR. SHAW: Can we stop this interruption of direct, your Honor.

THE COURT: I think that is best.

MR. SHAW: Because it is going in a much smoother way if we can do it in an orderly fashion.

A These notes were made from Mr. Gutman's presentation at that meeting. I am not doing that talking. That is Mr. Gutman doing that talking.

Q All right.

Mr. Silverman's notes or testimony also indicate that he considered it material that the figures do not take into account the liabilities of the general partners on their deficit capital positions.

MR. SHAW: I am not reading anything.

MR. MANDEL: I just want to see what the papers are. I am not going to pounce on anybody. My hands are -- if there are papers, I can't follow it.

Q When for the first time had the subject of deficit capital accounts of any of these general partners been mentioned to you?

A Some time in August 1970.

Q And thereafter, was any effort made to obtain payment from any of these partners having deficit capital positions of any sums of money?

A From August 1970 through and until the closing, efforts were being made to collect these deficits.

Q And did you make any of these efforts yourself?

A Yes, I did.

Q In the course of these efforts did you speak to any of the general partners in deficit capital positions?

A Yes, I did.

Q And these are persons who are named as -arties in this case, correct?

Q Yes.

Q Did you become familiar with their financial condition?

A I am familiar with what they told me their financial condition was.

MR. MANDEL: I object.

THE COURT: I think we better get a little more specific as we go along.

MR. SHAW: I will try and compress.

Q Andrew Newburger, did you speak with him during this period of time with respect to his deficit capital position?

A Yes.

Q What did he advise you?

MR. MANDEL: Is your Honor going to take the hearsay?

MR. SHAW: He is a party.

THE COURT: I am going to take it only as a basis of what he said, not as proof of the underlying fact. That's clear.

A I don't know that Mr. Newburger ever said -- Mr. Andrew Newburger ever said directly to me anything about his personal net worth. Others told me --

Q Let us skip him then.

A Okay.

Q Who did you speak with about this subject?

A Most of these discussions were carried on in rooms with a number of people present.

Q All right.

A And the mix in these meetings would change, as I have indicated before but in general there were general partners there. There were limited partners, there were subordinated lenders, and as deficit general partners discussed their deficits they said "I do not have any money to pay my deficit."

Q Did they say this on more than one occasion or only once?

A They said it numerous times.

MR. MANDEL: Can we have identifications of names?

THE COURT: I think it should be done.

Q Who said this?

A Robert Stern said "I cannot and will not make up my deficit."

Andrew Newburger indicated that he could not make up his deficit, could not pay it. Those two I recall specifically. Others it's a more general recollection. Robert Newburger indicated that he would attempt to make up all of his deficit, but at that time he said he did not have the means to do it but would make effort to make up all of his deficit.

MR. MANDEL: Can we have a time frame for these discussions?

MR. SHAW: Prior to December 31, 1970, correct.

MR. MANDEL: Shortly prior?

MR. SHAW: He said between August and December he had these conversations.

MR. MANDEL: Between August and December?

Q Did these conversations that you had between August and December --

THE COURT: Can you fix it better than that?

Q All right.

THE WITNESS: My conversation did not begin until after November 17, 1970. Others made efforts to recover those deficits between August 1970 and November 1970.

THE COURT: The conversations you have been testifying to are after November 17th?

THE WITNESS: Yes, sir.

THE COURT: All right, very good.

Q Is it correct that in the various balance sheets N, O and P, as well as the financial statement I, there is not included as a asset of Newburger, Loeb the deficit capital position of any of the general partners having deficit capital positions?

A That is correct.

Q Why is that?

A In my estimates it is not proper accounting. I have never seen that in a partnership balance sheet of any partnership. There is a second reason in Newburger, Loeb's case. The partnership agreement, Section 9-4 says deficits do not have to be made up to pay capital to other partners.

Q That is your legal interpretation, isn't it?

A Yes, sir. But it's improper accounting as far as I am concerned. I have never seen it.

Q Now, subsequent to December 31, 1970, were efforts made by Newburger, Loeb and by Peat, Marwick to prepare a financial statement certified for the year ending December 31, 1970?

A Yes.

Q And did you participate in that?

A For Newburger, Loeb & Company?

Q Yes.

A Only from an administrative point of view of hurrying people along who were preparing the numbers that were used in this partnership statement.

Q Who at Peat, Marwick worked on this statement that you recall?

A The partner in charge of the engagement was Richard McManus.

Q Who in addition at Newburger, Loeb had involvement with the preparation of the figures from which the statement was prepared?

A The controller's department worked with Peat, Marwick in the preparation of this statement, and certain of the partners of Newburger, Loeb made inputs to interpretations and to preparation of the statement.

Q I ask you to look at Exhibit VVVV.

A Okay.

MR. SHAW: Your Honor, at this point, if I may, I'd like to either read into the record or address the Court's attention to Paragraph 8.3 of the limited partnership agreement, because it is relevant to the next testimony, and I think that it should be focused on.

THE COURT: Why don't I look at it.

MR. SHAW: Maybe I can just hand it up 8.3.

Q Mr. Risher, addressing your attention to Mr. Lauterbach's report, he refers to an Atlas Realty settlement in the sum of $411,655. Was that a loss sustained by Newburger, Loeb?

A Yes.

Q Was that loss taken into consideration in computing the financial condition of Newburger, Loeb as of December 31, 1970?

A Yes, it was.

Q Was that loss used as a basis for computing the capital account of Charles Gross?

A Yes.

Q And will you tell the Court the basis for using that loss in making the computation with respect to Mr. Gross' capital account.

A I did not participate in making the charge to Mr Gross' account. However, the Atlas Realty settlement was a cost incurred in the year 1970. I have not had an opportunity to examine the Peat, Marwick working papers to see if there is a comment on them that says that such cost should not apply to the period prior to December 30th, but if there is such a comment, it flies in the face of all logic, and by making the charge it seems to me that there is strong indication that it clearly does apply to the period prior to September 30th.

The lease was entered into in 1969, and the arrangements to extricate Newburger, Loeb from that lease were entered into in 1970, the cost is chargeable to all periods in 1970 it seems to me.

Q When was the actual payment made?

A The payment was made over a period of months.

Q When did the obligation to make the payment of $411,000 accrue or arise?

A The deal was entered into with Mr. Atlas, I think, in September 1970, and as I recall --

MR. MANDEL: I object unless he knows.

A I don't know.

Q What is your best knowledge?

A That's it.

Q All right.

A The charge to Newburger, Loeb's income statement was I believe in November 1970.

Q I ask you to look at the next item --

MR. MANDEL: Excuse me one minutes, Mr. Shaw.

He testified that the payment was made over a period of months.

MR.SHAW: Correct.

MR. MANDEL: Would you just be a little more specific?

Q Let me ask you: Were those payments made over a period of months, and over what period of time were the payments made?

A 18 months I think.

MR. MANDEL: How much was paid in '70 and how much was paid after '70?

THE WITNESS: The December 31st statement carries a liability for at least realty of $232,950, so it follows from that that that amount was paid after December 31, 1970; but there is an accounting concept that has to do with liabilities and payments for things that are not being utilized and the proper way to reflect those as in accounting is an immediate charge on the balance sheet and the profit and loss statement.

Q Is it your view that that charge was properly set forth on the balance sheet?

THE COURT: Mr. Shaw, is he an accountant?

MR. SHAW: I will withdraw it, your Honor.

Q Was the liability to make the payment incurred during the period of twelve months after the date when Mr. Gross' withdrawal from Newburger, Loeb as a partner occurred?

MR. MANDEL: The dates are established here, Mr. Shaw.

MR. SHAW: I would just like to have ayes or no on that. I think it's an important point.

MR. MANDEL: It is irrelevant.

MR. SHAW: I don't think it is irrelevant.

THE COURT: Read the question gack, please.

(Question read.)

THE COURT: I think that's in the record already.

MR. SHAW: All right, I withdraw it, your Honor.

THE COURT: Sustained. Tell me why did you give me 8.3? I looked at it.

MR. SHAW: I think it is relevant for the Court to see and I don't know if there is --

THE COURT: It doesn't seem to bear on the question of this at last payment which I think is what you gave it to me for.

MR. SHAW: If it doesn't bear on that one, your Honor, I think it will bear on the next one because I think that for this 12-month period certain things occurred.

THE COURT: All right, very good.

Q I am going to address your attention to the next item on this schedule, quadruple V, prepared by Mr. Lauterbach, and ask you the basis for the adjustment reflected on the schedule.

MR. SHAW: I am just wondering, Mr. Mandel, if you have another copy of this so the Court could follow these adjustments.

MR. MANDEL: I don't. We are all sharing one.

MR. SHAW: There is a schedule of eight items, your Honor; I think the Court would be benefitted if you had the schedule before you.

MR. MANDEL: May I interrupt for a moment, your Honor? Part of this goes to interpretation of the agreement which sub silentio Mr. Risher is making, and which Mr. Shaw has made from time to time, which I think on its face is clearly erroneous, and if the interpretation of the agreement with regard to capital staying in for twelve months is clearly erroneous, then this testimony may be irrelevant or confusing, and perhaps we should straighten that point out, since Mr. Shaw has seen fit to --

THE COURT: Let me ask you this:

Isn't this really a matter of argument at this point, all the elements being in the record?

MR.MANDEL: Yes, exactly.

THE COURT: This man is not here as an expert witness on that subject, either in law or in acconting.

MR. SHAW: No, your Honor, and I don't intend to proffer him as such. However, what I would like to establish in the record, is the factual basis for making these various adjustments to Mr. Gross' capital account, and solely that. It is a question of law for the Court as to whether the adjudgments are correct, whether they are in accordance with the partnership agreement or not.

It is probably also a mixed question of accounting.

THE COURT: How does he add to that?

MR. SHAW: Only to indicate the nature of the facts giving rise to the loss from which the Court can conclude whether or not it should be a charge against a withdrawn partner's capital account.

THE COURT: Hasn't he done it? He said when the obligation was incurred, when they got out of it, and when they made the payments.

MR. SHAW: I know,your Honor, but there are 15 items.

MR. MANDEL: Yes, but we shouldn't have his testimony. If you want to establish the facts, establish them properly by records.

MR. SHAW: No, we don't need a record. A person is familiar with the losses, he can testify with respect to the losses. Otherwise we will have a hundred documents added to this record unnecessarily.

MR. MANDEL: Bring in Peat, Marwick or their work sheets on this question, Mr. Shaw.

MR. SHAW: I am asking proper evidentiary questions, in my opinion, and I think this is the correct way of establishing it. The facts are relevant. The president of the corporation is familiar with what went on.

MR. MANDEL: This witness is being allowed to generalize about information appearing in records which he cannot be particular about, and the records are the best evidence.

MR. SHAW: The present of a corporation can be asked when a payment was made.

MR. MANDEL: You are going to have him give the information about unsecured accounts and the list of them and the fact that they really -- something really happened?

MR. GRUTMAN: Somebody seems to have forgotten we don't have a jury here any longer.

MR.MANDEL: Now I am talking on the record to the Court.

MR. GRUTMAN: May I be heard?

MR.SHAW: Your Honor, there is --

THE COURT: Well now, Mr. Shaw, let's do this. Let's take item No. 2 from this witness and see where we get. From looking at the second following page, which is Schedule C-1 under Item 2, there is a statement that the write-off of unsecured accounts was "extraordinary" incurred in November 1970.

Is there going to be -- is he going to say that isn't so?

MR. SHAW: No. He is going to give the factual basis for the write-off, where the accounts were written off, what sort of accounts they were; from which the Court could conclude that conceivably this is an obligation which a general partner cannot avoid being charged against his capital account where there is an agreement containing a paragraph 8.3 such as this, when merely withdrawing.

THE COURT: Then I take it he is going to be in come conflict, necessarily, with the Peat, Marwick work papers which were prepared as I remember the testimony, by the Newburger, Loeb accounting department.

MR.GRUTMAN: No, Judge, not at all.

THE COURT: But if the work papers show that the settlement was extraordinary and incurred in November --

MR. SHAW: There is no such testimony.

THE COURT: No, there is.

MR. SHAW: Not extraordinary and it was incurred in November.

THE COURT:No, according to the work papers of Peat, Marwick, which is what Binder 12 of the Peat, Marwick & Mitchell work papers indicated, that the settlement was extraordinary and incurred in November of 1970. Now, ifhe is going to say something happened at some other time, then he is in conflict with those work papers.

MR. GRUTMAN: The work papers aren't in evidence.

MR. SHAW: He is not going to say that.

THE COURT: What?

MR. GRUTMAN: The work papers I don't believe are here yet.

THE COURT: I know they are not, but they were the ones that were the basis for this; and as you recall, I permitted this to go into evidence on the ground that Peat, Marwick was working at Newburger, Loeb's direction and as their accountants: that work papers were under subpoena to the Court, if anybody wanted them; and all I am trying to say is to what extent we are helped by getting some non-documentary testimony on this subject that seems to be in conflict with the corporation's own instruments prepared by their accounting department and apparently the subject of work papers by their independent accountants.

MR. GRUTMAN: I don't see the conflict, Judge, but I agree with your former premise.

MR. SHAW: I don't believe that will come out, your Honor.

THE COURT: Go ahead with 1.8 here and see what ourproblems are, and see whether there is profit from this line of inquiry.

Q Mr. Risher, I direct your attention to Item 2 referred to in Schedule C-1, and ask you --

THE COURT: Quadruple V, is that it?

MR. SHAW: Quadruple V, right.

Q And I ask you,what if anything,occurred during the month of November 1970 with respect to the unsecured accounts of Newburger, Loeb?

MR. MANDEL: Well, your Honor, isn't this exactly what you anticipated and I anticipated?

MR. SHAW: I don't believe so. He was there, he can tell us what occurred.

MR. MANDEL: He is either going to add nothing to what's before the court, or he is going to contradict the record.

MR. SHAW: No.

MR. MANDEL: And the auditor?

MR. SHAW: What he is doing is adding flesh to the words "unsecured accounts being written off" that means nothing. That is just a collection of words. What I'd like to have is testimony as to what happened that month.

THE COURT: In lecember?

MR. SHAW: November 1f 1970.

THE COURT: November?

MR. SHAW: Because there is goingto be an issue here, I think, as to whether or not this is properly chargeable against a withdraw general partner's capital account ornot under this agreement containing a paragraph 8.3.

THE COURT: Well, for the moment the objection is overruled.

Go ahead.

A The write-off of unsecured accounts is a bad debt write-off and it is a number of bad debts and the debts themselves were incurred in the period prior to November 1970.

Q I ask you the same.

MR. MANDEL: How long prior?

THE COURT: See, that is the problem. Mr. Mandel puts his finger on it. Then the question is, you are getting down into all kinds of accounting niceties, that there was a '68 debt before Mr. Gross joined and it's written off after he's terminated, these are the problems that I think I --

MR. SHAW: I think I can box it in, your Honor.

Q Were these customers' accounts?

A Yes, they were.

Q And as of what date did Newburger, Loeb stop having customer?

A September 30, 1970.

Q As of what date, what is the last date these debts could have been incurred?

THE COURT: I don't follow that.

A September --

THE COURT: Wait a minute, Mr. Risher. What are debts?

MR. SHAW: Your Honor, these are debit balances as I understand the testimony in customers' accounts.

THE COURT: What is this question about the last date they could have been incurred?

MR. SHAW: This establishes that these debts had to have been incurred prior to the date that Newburger, Loeb ceased here.

THE COURT: Suppose they were incurred prior to the date that Mr.Gross went with Newburger,Loeb? How about that?

THE WITNESS: Unlikely.

THE COURT: I know but unlikely -- we are trying to get at something that is meaningful here. That is what it amounts to.

THE WITNESS: They would have been written off in the November 1969 audit.

MR. SHAW: Your Honor,what I am trying to achieve here, if we start getting involved in producing all these documents, everything that we tried to achieve through the waiving of a jury is going to be dissipated. It seems to me that we should be able to get this out in direct examination. If Mr. Mandel wants to cross examine, that is perfectly proper; but I'd like to hit upon the highlights of these write-offs, provide the factual basis for it without evidentiary objections. We are not before a jury.

THE COURT: Mr. Shaw, Mr. Risher still doesn't know what he is talking about. They can't be generalities. He still has to have some knowledge.

MR. SHAW: He is indicating what his knowledge is.

MR. MANDEL: Yes, but it may conflict with the records and it probably does. For example, he says the debts could not have been incurred after the clearing date, but the fact is that the clearing agreement provides liability against Newburger, Loeb for some customers' accounts.

MR. SHAW: But they didn't get any customers after that date.

MR. MANDEL: Look, we brought in an accountant. We brought in proper records. We were forced to make a foundation. Peat, Marwick is your people. That's your witness for this. Not Mr. Risher.

MR. SHAW: We waived the foundation of these -- of the work papers so that this schedule could go into evidence. We waived those work papers. We had a conference at the bench where the Court indicated it would serve a supboena forthwith. To save time, to avoid your having to have a foundation, I waived it.

MR.MANDEL: Bring an expert.

MR. SHAW: Now when I am trying to get an interpretation and to get testimony, he is saying bring an expert and produce the work papers.

THE COURT: I am not saying you have to bring an expert. I am just saying before Mr. Risher can testify about these matters, he's got to have some knowledge about them. I am prepared to accept what his knowledge is but when he says that something is unlikely, it means that he doesn't really have an awful lot of knowledge.

MR. SHAW: What he is doing is making a deduction from something that he does know. He knows that as of a certain date Newburger, Loeb didn't have any more customers, didn't bring any new customers in.

THE COURT: Let's put those things in the record and see if we can go ahead.

Q Let me see if I can box it in this way.

The write-off referred to in Item No. 2 is a write-off with respect to what type of account?

A Customer account.

Q And by that is meant the person who buys or sells securities, correct?

A Yes.

Q And as of what date did Newburger, Loeb cease clearing?

A September 30, 1970.

Q Do any of the sums written off as reflected in Item No. 2 involve liabilities or debts incurred by Newburger, Loeb subsequent to September 30, 1970?

A No, they do not.

Q Was it the customary procedure of Newburger, Loeb to write off unsecured accounts at the end of each year?

A It is customary for companies to --

THE COURT: No, no.

A -- write off --

THE COURT: Mr. Mandel has an objection and I am going to sustain it to that question. I think we have to ask him what he knows about when these accounts became bad, when were they incurred and when did they --

MR. MANDEL: Let's do it specifically. Does he know when some of themwere incurred before Mr. Gross became a partner?

THE COURT: Let's ask him what he knew about when they were incurred. That's what it amounts to.

MR. SHAW: All right.

Q What do you know as to the period of time in which these debts, these sums of money which became due to Newburger, Loeb became due?

A These debts were determined to be uncollectible between April 1970 and September 30th, 1970.

MR. MANDEL: I move to strike as not responsive.

THE COURT: Yes, strike it out.

Q When did these debts become sums of money due to Newburger, Loeb?

A I cannot tell you that.

Q. Prior to April, 1970, were the sums of money reflected in these accounts assets or liabilities?

A Assets.

Q I'd like to address your attention to Item No. 3.

Are you familiar with the facts involved in that write-off?

A Yes, I am.

Q And are you familiar with the James Anthony account?

A Yes, I am.

Q And will you tell the Court the factual basis which you are aware of for that write-off?

A That write-off is exactly like Item 2. It is a bad debt write-off. In this case it is a broker dealer. James Anthony was a broker dealer who owed Newburger, Loeb money and it was determined to be uncollectible.

Q During what period of time?

A Between April 1970p and the date in this case of the write-off, November 1970.

Q Prior to April 1970, had the sum of money reflected in that write-off been considered an asset or a liability of Newburger, Loeb?

A An asset.

THE COURT: Do you know the date on which the money was first owed?

THE WITNESS: No,sir, I do not.

THE COURT: I see.

Q Do you know the reason why the sum of money was written off?

A Yes, it was uncollectible and it represents a real loss.

Q Now I direct your attention to Item No. 4. Are you familiar with the write-off of a sum of money involved in N.L. Sports?

A Yes. That item -- yes, I am.

Q And what was the amount written off?

A That was the remaining -- the amount written off was $52,124.

Q Whatwas the factual basis, according to your knowledge, for writing off that sum?

A That was the remaining amount of assets left on Newburger, Loeb's books as a result of the Buffalo Braves transaction.

MR. SHAW: Can we stipulate, Mr. Mandel, that that liability was assumed during the period of time when Mr. Gross was a general partner, if not managing partner of Newburger, Loeb?

MR. MANDEL: No, we can't.

Q Do you know when that obligation to pay that sum of money on the part of Newburger, Loeb was incurred?

A No, I do not.

Q I show you Item No. 5. Are you familiarwith the write-off of dividends receivable, 90 days old?

A Yes.

Q Was the sum of $34,463 written off in the December 31, 1970 financial statement?

A Yes.

Q and what, according to your knowledge, was the factual basis for writing off that sum of money?

A That's in the nature of mechanical accounting practice, whereby dividends that are not --

MR. MANDEL: Your Honor, he is now testifying as an expert about accounting practices.

THE COURT:Yes, sustained.

Q Just tell us the factual basis for doing it without any accounting background for doing it, as it related to the business procedures and what was done at Newburger, Loeb at that time?

Q Whatthis means is that dividends that are supposed to have been received that have not been received within 90 days are assumed to be not coming, and therefore are written off.

MR. MANDEL: Does he know if they ever came?

THE COURT: Mr. Risher, the question has to be, do you have a personal awareness of the fact that these dividends were not received, I take it, some time between January 1st and September 30th of 1970?

THE WITNESS: I have -- the number gives me that awareness. I know that we did not receive -- that we had dividends over 90 days due for more than 90 days of that amount at the end of 1970.

Q To what period were those dividends attributed?

A Prior to the 90 days I don't know. It could have been any time prior to the 90 days. Between April 27th--

THE COURT: Could it have been as long as two years, three years?

THE WITNESS: No, sir, because it would have been caught in the Apirl 1970 audit.

MR. MANDEL: Were any ever collected? Does he know?

THE COURT: Mr. Mandel, let's save that for your cross.

Q I direct your attention to Item No. 6. "Year end incentive bonuses $38,220."

A Yes.

Q And I ask you whether you are familiar with the factual basis for that write off?

A Yes, I am.

Q And will you tell the Court what that factual basis was?

A Several of Newburger, Loeb's employees had, as part of their compensation, a bonus, and that bonus was to be paid to them at the end of the year, so that bonus was paid to them for the year of 1970.

Q Was that charge, as well as the preceding charges or write-offs that you have been talking about, a charge against the capital account of all of the general partners of Newburger, Loeb?

A Yes, sir.

Q And was a portion of that charge used to compute Charles Gross' capital account as at December 31, 1970?

A I believ eso.

Q Are you familiar with Item No. 7?

A No, Iamnot.

Q Are you familiar with Item No. 8?

A Yes, I am.

Q Was the sum of $11,661 set up as a reserve for guaranteed notes contingencies?

A Yes, it was.

Q Will you describe the factual basis for setting up that reserve?

A Yes, Peat, Marwick made a mistake.

Q Will you elaborate?

A Yes, that's an improper reserve. We collected the money.

THE COURT: In other words, that should not have been a deduction against anybody?

THE WITNESS: Our adversaries are right.

MR. GRUTMAN: How much was that item?

MR. SHAW: $11,661. 16-1/2 percent is about $1,800.

Q I show you Item No. 9 and ask you if you are familiar with the reserve set up for N.L. Sports in the sum of $47,876?

A Yes, I am.

Q Will you tell the Court the factual basis for setting that reserve up?

A That like the previous item involved, the Buffalo Braves, and that represents an additional reserve on the balance sheet connected with litigation and losses that still might be incurred from the sale of the Buffalo Braves.

MR. MANDEL: One moment, please.

I am going to ask for some basis for the number. This witness is testifying and testifying. Do you know -- he should not be allowed to talk about this unless he knows some basis for the number. That is what I have been saying all along.

THE COURT: Well, yes, as to this item, which is different than others, Mr. Mandel, this is a reserve item. The customer accounts obviously would come from the books but I think your position is well taken on this.

Q How was the amount of the reserve which was set up arrived at?

MR. MANDEL: And by whom?

MR. SHAW: That will be the next question.

Q If you know.

A I don't know.

Q I direct your attention to Item No. 10, and ask you if you are familiar with this reserve.

A Yes.

Q What is the sum of $60,000 set up as a reserve for short market value of dividends receivable.

MR. MANDEL: I object to the leading question. Let him state.

MR. SHAW: I am reading from a document in evidence.

MR. MANDEL: Let him state what he knows. That is what we are talking about.

MR. SHAW: I am summarizing complicated schedules, your Honor. Reading from a document in evidence is hardly impermissible.

THE COURT: True but let's find out what he knows about that item.

MR. SHAW: All right.

Q Now, what to your knowledge is the factual bais for the establishment of this reserve, Item 10?

A This is another kind of dividend, in this case the dividend instead of being cash is a security dividend from a stock split or two percent stock dividend, that might, as in the preceding case when the company is to receive a dividend, a security dividend and has not received it, then this reserve is set up.

MR. MANDEL: That's a generalized statement.

THE COURT: Yes, I know. So far this doesn't rise to the level of factual input to me. Go ahead.

MR. SHAW: All right.

Q I also address your attention to Item No. 11, and ask you if you are familiar with that reserve?

A No, I am not.

Q I direct your attention to Item No. 12, and ask you if you are familiar with that write-off.

A Yes, I am.

Q What is the basis for that write-off?

A At the time that the company converted from a manual to an automated bookkeeping system, it incurred certain costs to do this. These costs were set up as an asset because you have a system now that works and the cost to do it were amortized over a period of time. Newburger, Loeb went out of the clearing business September 30, 1970, so a portion of that automated cost was written off, because it was useless now to us.

A remaining partner was continued on the books because that involved our normal just accounting for profit and loss and balance sheet statements, and we were still receiving benefits from that, so no write-off was taken. This write-off applies only to the cost of the system involved in the clearing transactions.

MR. MANDEL: Does the witness know anything about the numbers besides the generalized explanation?

THE WITNESS: Yes, I do.

THE COURT: What do you know?

THE WITNESS: I negotiated that number.

THE COURT: What does that mean?

THE WITNESS: I attempted to keep that number as low as possible, because it was of benefit to the corporation to have as much in the way of assets on its books as it could have.

THE COURT: I will let you cross on that, Mr. Mandel.

Q I show you Item No. 13, and ask you whether you are familiar with that accrual.

A No.

Q Let me ask a leading question.

Does that accrual represent the expense of the audit?

MR. MANDEL: I object.

THE COURT: No, I will permit him to try to refresh the witness' recollection, he having said he doesn't know anything about it.

Let's see if his recollection can be jogged. Overruled, go ahead.

A What the number means is that the accountants were going to charge us more than we had been allowing for directors of the year, and we had under-accrued the amount of their fee and this is their way of putting it on the books that -- tell us politely how much we are going to owe them.

MR. MANDEL: That's inconsistent with the statement on the --

THE COURT: Mr. Shaw, let me look at the statement.

(Document handed to the Court.)

THE COURT: Mr. Mandel seems to have his point well taken in that this was a 1971 expense that was being set up as a reserve in 1970.

MR. MANDEL: Yes, even though the prior years had been taken in 1970. In other words, it is what accountants call a double debt.

MR. SHAW: Mr. Mandel can ask his questions. I'd like to move along.

THE COURT: Mr. Risher, I think, will acknowledge what I said, that expenses would not have been incurred until 1971.

THE WITNESS: Right, I agree with you.

Q When did you have to pay that money to the accounting firm of Peat, Marwick?

A Some time in the spring of 1971.

Q Within the 12 months from September 30th?

THE COURT: No, Mr. Shaw, that's argument. Go ahead.

Q I direct your attenion to Item No. 14, and I only have two more items, your Honor.

Are you familiar with the factual basis for that item?

A No, I am not.

Q I direct your attention to Item No. 15. Are you familiar with that item?

A Yes, I am.

Q Would you tell the Court what the factual basis behind that item is?

THE COURT: What is that item?

MR. SHAW: That is why --

THE COURT: Go ahead.

A This is a totally different item from anything that we have discussed thus far. Mr. Lauterbach has testified, I believe, that he believed that the firm should have carried as an asset on its books a receivable from New York State and New York City for carryback tax refund claims. We attempted to -- first of all it was footnoted in the audit statement, and we attempted to make collection on those tax refund claims, and were denied by the State of New York and by New York City. That is still perhaps an open possibility to get some portion of this claim at some point down the road. In other words, we have not crossed it off as an item, but to have carried it as an asset on the books we would have not been able to make collection and it is now 1975, seems to me improper.

MR. MANDEL: Would your Honor indulge me just for a little bit of either cross examination or discussion about this item so that everything is not fragmented here?

THE COURT: No, you wait.

MR. MANDEL: All right, I will wait my turn.

THE COURT: And then direct my attention to an area in which you are examining, and we will take it at that time.

MR. SHAW: It is not that complicated.

Q Now, Mr. Risher.

THE WITNESS: Your Honor, I know it is just two minutes to one and I am about right into another chunk.

THE COURT: Yes. It is a good time for lunch. We will reconvene at 2 o'clock.

(Luncheon recess.)

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NEUBURGER, LOEB & COMPANY, INC.,

vs. 71 Civ. 685

CHARLES GROSS, MABEL BLEICH and
GROSS & COMPANY

July 18, 1975
2:00 p.m.

MR. GLATZER: Your Honor, we have an application. The application is that Mr. Muh be permitted to testify this afternoon starting now and Mr. Risher be excused, although albeit in the middle of his examination, because of a personal problem in behalf of Mr. Muh.

His father is undergoing surgery Monday morning.

THE COURT: Any problem with that, Mr. Mandel?

MR. SHAW: I am at a point where I can stop with Mr. Risher very easily.

MR. MANDEL: I am sorry, but I can't agree to that. I am not prepared for Mr. Muh. I am prepared for Mr. Risher. I think it would be prejudicial. I think what we should do with Mr. Muh --

THE COURT: Is take him later in the week?

MR. MANDEL: Yes. Whenever he likes.

MR. SHAW: He is the next logical witness after Mr. Risher, your Honor.

THE COURT: That may be. But if we are going to have to work -- this is something for Monday?

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MR. GLATZER: Monday morning.

THE COURT: This is in New York City?

MR. MUH: Yes, sir.

THE COURT: Then we'll have to take you Tuesday or Wednesday.

Mr. Mandel is not ready to deal with you as a witness. That is inappropriate, also. I can appreciate your problem and we'll accommodate you by not requiring anything on Monday for sure. But I don't think we can do it this afternoon.

MR. GLATZER: Very well.

THE COURT: All right.

PAUL D. RISHER, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. SHAW:

Q Mr. Risher, what was the capital account of Charles Gross in Neuburger, Loeb and Company as of December 31, 1970?

MR. MANDEL: I object.

THE COURT: Mr. Shaw, without some foundation that this man is going to give us an accounting answer that is worth something, I think the objection is well taken.

Q Based upon Exhibit I --

THE COURT: It seems to me you have got to lay some foundation. Exhibit I is in evidence. That has a statement of accounting.

MR. SHAW: All right. It is in evidence.

Q Let me ask you this question.

Based upon Exhibit I, what was the capital account of Mabel Bleich and Jeanne Donoghue as of December 31, 1970?

MR. MANDEL: Objection.

THE COURT: I take it the same ruling, because I gather it is in the exhibit.

MR. SHAW: No, it is not, your Honor.

THE COURT: What is the foundation for him giving any authoritative testimony as to what their capital account is?

MR. SHAW: The foundation is this document sets forth what their capital account is in reality.

THE COURT: Then it is in evidence. That is in evidence, too.

MR. SHAW: But the number is not the same as the number set forth here. I think testimony is appropriate, your Honor.

THE COURT: Well, I'll listen to it subject to a motion to strike, because the man is not an accountant. We have no foundation that he is in a position to make any authoritative accounting figure for us.

MR. ROTHMAN: Peat Marwick's statement does show a capital account of Jeanne Donoghue and Mabel Bleich.

MR. SHAW: Your Honor, we're wasting time.

THE COURT: We may be doing it either way. Go ahead.

Q What was their capital account as of December 31, 1970? And I'm referring to Mabel Bleich and Jeanne Donoghue.

A Taking into account the $495,000 of aggregate loss, which is an encroachment into limited partners position, brings their total capital account down to $104,000.

MR. MANDEL: Your Honor, I object and move to strike. What this witness has done is to combine an answer which interprets the agreement, the partnership agreement --

THE COURT: I'm going to strike that answer. There is no foundation for it. It doesn't mean anything to me at all.

MR. SHAW: May I just be heard on that?

The December 31, 1970, financial statement sets forth the fact that the capital of the general partners had been eroded to the extent of $900,000. In other words, it sets forth the fact that there was a total deficit in the combined capital accounts of all of the general partners -- I'm sorry, totalling $495,000.

As of that point it is erroneous to state that the capital account of any of the limited partners who, for example, had a capital account of $75,000, who were $75,000 limited partners, had not been affected by that erosion.

THE COURT: Well, do I gather that 495 figure is the deficit under the general partners?

MR. SHAW: Correct.

THE COURT: So this is a matter -- what you have done is ask him to do the subtraction of that figure from the total of two million one.

MR. SHAW: Correct.

THE COURT: And then allocated --

MR. SHAW: Right.

THE COURT: And that is a mathematical calculation.

MR. SHAW: Which he has done and he comes to that figure.

THE COURT: I'll permit that in the nature of argument. The underlying exhibits are in evidence.

Go ahead.

It is no more at this point than Mr. Risher doing our mathematics for us based on Exhibit I.

MR. MANDEL: There is an implication, your Honor, that it is meaningful, and --

THE COURT: No, I'm not taking it any more than mathematics, Mr. Mandel.

BY MR. SHAW:

Q Mr. Risher, as of what date did you receive the certified financial statement of Newburger Loeb prepared by

Peat, Marwick and Mitchell, approximately?

A That's difficult for me to approximate. Sometime after March of 1971. And it could have been substantially after.

Q Subsequent to December 31, 1970, did you attend any meetings attended by the general partners, the limited partners, the subordinated lenders or their attorneys of Newburger Loeb?

A Yes. I attended numerous meetings.

Q When was the first meeting that you attended subsequent to December 31, 1970?

A I don't recall.

Q Were you at the meeting of January 15, 1971?

A The one with Mr. Mandel and Mr. Gross?

Q Yes.

A Yes, I was.

Q All right. And can you recall that meeting?

A Yes, I can.

Q And can you recall in substance what transpired?

A Yes.

Q Will you tell us?

A I went to that meeting, as I went to most of the meetings involved here, with the balance sheet and I asked Mr. Mandel and Mr. Gross to take a look at the balance sheet and view what the condition of the company was.

They, as I recall it, initially said they didn't want to see any numbers, they didn't want to see any balance sheet.

I believe I asked Mr. Gross whether he was familiar with the condition of the company since it had been some time since he had been a partner, and he said, as I recall it, yes, and I think he said he didn't need to see a balance sheet in order to be familiar with the condition of the company.

We discussed to some extent the transfer transaction that we were involved in. Mr. Mandel allowed as how he did not think the transaction could be entered into without Charles Gross' agreement and without Mrs. Bleich's agreement and without Mrs. Donoghue's agreement. He used some legal terms that I did not understand and we left the meeting with Mr. Persky telling Mr. Mandel that he would keep him informed of the transaction, or what was going on, to put him on the distribution list with all the other attorneys and would then include him in all the papers that were distributed amongst the attorneys who were participating in this transaction.

We discussed the fact that there were counterclaims against Gross and that a number of the entities who were involved in this transaction felt that Mr. Gross was accountable, should be held accountable for certain of the problems of the company.

The purpose of the meeting was to endeavor to get Mr. Gross to accept the same treatment as other partners in positive capital positions and to get Mrs. Bleich and Mrs. Donoghue to accept the same treatment as other limited partners.

That's all I can recall in substance of what happened.

Q Now, to focus this, was this the first time that you had met Mr. Mandel?

A I think so.

Q And during the period since August of 1970, was this the first time that you had met again with Mr. Gross?

A That's my recollection.

Q And as of December 31, 1970, had Miss Bleich and Mrs. Donoghue signed or indicated that they were going to sign or at least go along with the proposed reorganization?

A At December 31, 1970, I was pretty sure that Mrs. Bleich was going to go along with the transaction and the reorganization. I was less sure of Mrs. Donoghue.

One of the reasons for being less sure was just the logistical problem of trying to deal with Mrs. Donoghue in terms of consents and so on. She was in Australia and it was difficult to do.

Q Now, as of January 15, 1970, when had you first learned that there was going to be any problem or disagreement involving Mr. Gross, Miss Bleich and Mrs. Donoghue?

MR. MANDEL: I object to the form of the question.

THE COURT: Yes. Sustained.

Q Mr. Mandel made certain statements at this meeting, correct?

A Yes.

Q Had you heard those statements before this meeting?

A No.

THE COURT: What statements are you talking about?

THE WITNESS: Yes. That's what I'm having trouble with.

Q I'm sorry. The substance of Mr. Mandel's statements at the meeting were that Mr. Gross would not go along, or what? What was the substance of his statement?

A Well, the substance of the statement was that we could not enter into the transaction without Mr. Gross agreeing and without the two ladies agreeing. And that was the first time I had ever heard that expressed.

Q Now, at this meeting, did you overhear any threats being made by anyone to Mr. Gross or to Mr. Mandel in Mr. Gross' behalf?

A If one considers that we said that there were counterclaims against Mr. Gross and that people might assert those counterclaims, if one can interpret that as a threat, that was expressed.

THE COURT: Mr. Risher, did you hear anybody say that if Mr. Gross stood in the way of this transfer agreement he would be tied up in suits or litigation for a long, long time?

THE WITNESS: I have no recollection of that being said at that meeting.

THE COURT: I see. All right.

Q Did you hear Mr. Persky say that at that meeting?

A I have no recollection of hearing that at that meeting.

Q At another meeting did you hear another person say that, or in substance those words?

A Yes, I have heard at other meetings other persons make such statements.

Q What other meeting and what other persons?

A Well, at the December 10th meeting of limited partners, Mr. Richenthal and Mr. Steefel both made very strong statements about Mr. Gross and that they felt he was accountable for problems of Newburger Loeb and that in many of those problems they thought that he could be held accountable by suing him and they expressed it in words stronger than that and the quotes don't come easily to mind.

I also heard similar kind of comments from Max Freund and Mr. Freund also said that he felt Mr. Gross was accountable, should be held to account for the problems of Newburger Loeb and that he should be sued. And, again, the words were stronger than the way I have given them here, but I don't recall the quotes directly.

Q Subsequent to the December 10th meeting, was there another meeting attended by Mr. Steefel?

A There were numerous meetings.

Q And did Mr. Steefel make any further statement to Mr. Gross at another meeting?

A You phrased that question as Mr. Steefel saying it to Mr. Gross.

Q Yes.

A I don't know that Mr. Steefel met Mr. Gross.

Q All right. Did he say anything at another meeting about Mr. Gross and what would happen or what might happen?

A To the extent that Mr. Gross' name came up in these numerous meetings that there were, it was never mentioned kindly.

MR. MANDEL: I object.

THE COURT: Let me hear that question and answer, please.

(Record read)

THE COURT: Strike that out.

Q You say that Mr. Steefel made a statement at a December 10th meeting. Can you recall Mr. Steefel making such a statement at another meeting as well?

A I don't have any specific recollections. I do have a specific recollection at the December 10th meeting but not at subsequent meetings.

Q Were you at the meeting of February 5, 1971, attended by Mr. Steefel?

A Yes, I was.

Q I show you FFF in evidence and direct your attention to page 2, with the notation in the column "Steefel" and ask you if it refreshes your recollection with respect to anything that Mr. Steefel said at that meeting.

THE COURT: Let's find out whether he needs it refreshed, first.

MR. SHAW: I think he said he doesn't recall.

THE WITNESS: I said I didn't recall.

THE COURT: You don't recall him saying anything at that meeting?

THE WITNESS: I said I didn't recall any further comments about suing Mr. Gross made by Mr. Steefel after the December 10th meeting.

THE COURT: Very good. Go ahead.

Q Will you just look at that and see if that refreshes your recollection?

(Pause)

MR. GRUTMAN: Those are the notes of February 5th,

Mr. Shaw?

MR. SHAW: Right.

(Pause)

A Yes, this refreshes my memory.

Q And what do you recall was said by Mr. Steefel at the February 5th meeting?

A He said the words that are in this exhibit, in substance. I don't know that this is a direct quote, but in substance he made these statements.

Q And what were those statements?

A He says, "The demand for cash is utterly crucial. Charles Gross is one of 20 involved in this," and I assume he meant by that 20 general partners. "Each one of them has a personal position. Each of them has their life savings in this. Every person would like cash. From an equity point of view, why is Charles Gross more deserving of cash? If no deal, he can't have cash. He will only have lawsuits. If he takes Steefel's deal, he can do other things on Wall Street. While lawsuits, he can't do anything. If no deal, he is in bad shape. If a deal, he has a liveable situation."

THE COURT: Excuse me. Who do you recall saying this in substance?

THE WITNESS: Mr. Steefel.

Q Subsequent to the meeting of January 15th, where

Mr. Mandel was present, did you attend another meeting of the various general partners or limited partners or their representatives and attorneys of Newburger Loeb?

A I attended numerous of those meetings.

Q Can you recall when the next meeting was?

A No, sir.

Q Were you at the meeting of February 8th?

A I do not think so.

Q And you were at the closing of February 10th, correct?

A Yes.

Q All right.

A The closing was February 11th.

Q During the period from December 31, 1970, to February 10th, did there come a time when a letter was sent by Mr. Berkowitz to Rakind and Company, to your knowledge?

A I'm not sure whether it was my knowledge then or my knowledge as a result of having seen that letter in the course of this trial.

Q Do you have any recollection whatsoever of discussing with Mr. Berkowitz or any employee or partner of Newburger Loeb whether or not such a letter would be sent or discussing Mr. Gross' potential or future employment by any employer?

A I have a recollection of Mr. -- of something being said about Mr. Gross going to Heine and Company. I cannot recall anything about his going to Rafkind and Company other than being aware that he was going to Rafkind and Company. How I became aware of it, I don't know.

Q Did you do anything to interfere with Mr. Gross' employment by Heine and Company?

A No, sir.

Q Did you do anything to interfere with Mr. Gross' proposed employment by Rafkind and Company?

A No.

Q Did you ever agree with anybody to do anything of that sort whatsoever?

A Not to my recollection.

Q Did there come a time --

THE COURT: Mr. Risher, would you recall it if you did?

THE WITNESS: I'm not sure. It is possible that it is a lost detail, if there is such a detail. I don't know.

THE COURT: All right.

Q However, during this period of time you did have an exchange of memorandum dealing with the Buckley claim, correct?

A That was in December.

Q In December, yes What, if anything, was done during the period between December 31, 1970, and February 10, 1971, by you or by Newburger Loeb, to your knowledge, with respect to the Buckley claim?

A The only thing specifically that I recall was that -- I'm not even positive it occurred in that time frame, but I made some arrangement with Persky for the payment of Finley Kumble's fees in connection with the recovery on the Buckley claim.

Q By the way, you had prepared, I believe, or you brought into court and made available to me and to Mr. Mandel, a schedule of the legal fees paid by Newburger Loeb to Finley Kumble during this period, have you not?

A Yes.

Q And I place before you Plaintiff's Exhibit 120 for identification and ask you if this is the schedule.

A It is a schedule that I located in my files.

Q And do you know who prepared this?

A No. I'm sorry, I don't.

Q Was it prepared by an employee of Newburger Loeb?

A I'm certain that it was.

Q And was it prepared upon the basis of the records and invoices in Newburger Loeb's possession?

A Yes.

THE COURT: All you know is you found a piece of paper, isn't that what it amounts to?

THE WITNESS: Perhaps my assertions are too strong.

THE COURT: Let me see the piece of paper.

MR. SHAW: I offer this in evidence.

MR. GRUTMAN: I object to it.

THE COURT: Mr. Mandel, you looked at this, have you?

MR. SHAW: He had it for about a week or two, your Honor.

THE COURT: What position do you take?

MR. MANDEL: I object to it. I don't believe it is accurate. I don't think we should take documents in evidence, your Honor, unless somebody is responsible in one way or another for its accuracy.

MR. SHAW: I'll withdraw it at this time.

THE COURT: It is withdrawn.

Q Can you tell us whether you have any knowledge with respect to the total compensation paid to Finley Kumble with respect to the services rendered by Finley Kumble on Newburger Loeb's behalf during the period up through February 10, 1971?

MR. GRUTMAN: I object to that, your Honor. I don't think there is any relevant consideration of monies that were paid to the law firm for professional services rendered except on the question of what amount was contingent, what had not yet been paid, and you've already heard that proof.

But to go into what we were paid for other services performed --

MR. SHAW: It is really an unimportant --

MR. GRUTMAN: If it is unimportant --

MR. SHAW: But it was asked by Mr. Mandel.

MR. MANDEL: If he knows, I want the information. I think it is appropriate here. But if he doesn't know, I don't think he should be permitted to guess.

Q The question is, do you know?

A May I have the question back?

THE COURT: Do you know what was paid to Finley Kumble on behalf of the partnership during what period --

MR. SHAW: The period up through February 10, 1971, the date of the transfer agreement.

THE COURT: Finley Kumble's objection is overruled, if he knows. The question at this point is does he know and we'll go from there. Do you know?

MR. GRUTMAN: Except as it comes off that paper that he prepared.

THE WITNESS: Except as it comes off here, I'm sorry, I don't know.

THE COURT: The answer is you do not know.

BY MR. SHAW:

Q When this lawsuit, the Buckley assigned claim, was instituted, you were the president of Newburger Loeb, correct?

A Yes.

Q And as of the date of the institution of the lawsuit, what knowledge or information did you have with respect to the merits of the claim?

A I thought it was a good claim.

MR. MANDEL: Sorry?

THE COURT: He thought it was a good claim.

Q And upon what did you rely for that opinion?

A I relied mainly from being advised that it was a good claim by Larry Berkowitz.

Q In that memo that has been placed before you?

A Yes.

MR. MANDEL: What is that document, please?

MR. SHAW: It is a memorandum dated December, 1970.

THE WITNESS: That memorandum plus a certain amount of limited discussion about the claim.

MR. SHAW: Marked Finley Exhibit B.

Q And with whom did you have that discussion?

A Mr. Berkowitz.

Q Did you analyze --

A And I think I probably had some limited amount of discussion with Mr. Persky.

Q And has your view changed during that period of time, from then to now?

A No, it has not.

Q Are you still of the view that it is a valid claim?

A Yes. But now I rely more on my knowledge and don't have to rely as much on the knowledge of others.

Q And is that as of this point your own personal opinion?

A Yes, sir.

Q Did you authorize the institution of this action?

A I agreed to the institution of this action as a member of the executive committee.

Q And did you authorize the institution of this action for the purpose of injuring Mr. Gross or coercing him or compelling him to do something, or solely for the purpose of harassing him?

A No, sir. At this point it represented an amount of money that was potentially recoverable for Newburger Loeb and I wanted to try to recover that money.

Q Are you familiar with the sums of money spent by Newburger Loeb as of this date in connection with the prosecution of the Buckley claim in this court?

A And all of the things that are now related to the claims and counterclaims?

Q Yes.

A Yes, I am.

Q How much?

A With Finley Kumble -- correction. I need to change my previous answer. I do not know how much money in specific terms.

Q Can you give us the figure within tens of thousands of dollars?

A Yes. Over a hundred thousand dollars.

Q All right.

A And there is due approximately -- approximately one hundred thousand dollars has been expended and -- I'm reluctant to say this in court, but there is due and owing to Finley Kumble another $80,000 for services that they have billed us for in this matter.

MR. MANDEL: In connection with this case?

MR. GRUTMAN: Largely.

THE WITNESS: Yes, I think so.

THE COURT: This hundred thousand dollars, Mr. Risher, is for the whole case?

THE WITNESS: Yes.

THE COURT: Not just attributable to the Buckley claim?

THE WITNESS: Yes.

MR. SHAW: That was the question, your Honor, in this case.

Q Do you have any figures breaking down those figures with respect to the prosecution of plaintiff's case as opposed to the defense of the defendant's counterclaims?

A No, sir, I don't.

Q Do you recall if, during this same time span, December 31, 1970, through the date of the transfer agreement there was any conversation of which you were a party with respect to Section 98 of the partnership law of the State of New York?

MR. MANDEL: You are including the night of the transfer agreement?

MR. SHAW: Yes.

A Now I'm confused. May I have the question?

THE COURT: Yes, please.

(Question read)

A I think the first time that I recall hearing Section 98 mentioned as a section -- the first time I actually recalled knowing of Section 98 where there was a specific recollection in my mind is when I read Judge Ward's decision. But I'm sure I had read about it in the papers presented to me prior to that time. But it firmly fixed itself at that point.

Q During this same period of time, was there any conversation of which you were a party with respect to the question of the legality of the transfer without the consent of Miss Bleich and Mrs. Donoghue?

A Yes.

Q When was that mentioned for the first time?

A The first time that it was ever mentioned, Mr. Mandel mentioned it in the January 15th meeting.

Q When was that mentioned thereafter?

A The next time that I have a recollection of that mention was at the night of the closing.

Q All right. Now, will you tell the Court what occurred that night insofar as this section or this question of legality is concerned?

A My relation to it is somewhat peripheral. During the closing I spent most of the time in a separate room apart from the main room, signing documents. Documents were being brought to me for my signature and I would sign them.

The main conference room and the main closing conference was being held in Finley Kumble's library. It is my understanding that Mr. Burak in that room said that he could not --

MR. MANDEL: Excuse me. I misheard you. Did you say it is your understanding?

THE COURT: It is hearsay. Strike that out.

MR. MANDEL: Okay.

Q Did any of the --

A May I finish? Because I --

THE COURT: No. This is what you were told by somebody else.

Q Somebody made a statement to you. You can carry on from there.

A At some point I was then out of my room and the closing had stopped going forward because of Mr. Burak's statement, and I said to somebody, and I don't know who, "Well, what are we going to do? What is going to be done here?"

And someone said, and I don't know who, "Mr. Persky has researched the law in this matter and is going to render an opinion as special counsel."

Subsequent to that I sat in Mr. Persky's office, there were other members of the corporation there, and I don't recall which ones, Mr. Persky was there, Mr. Bamberger was there. Mr. Persky had prepared the memorandum, his opinion and I think I asked him some words to the effect, "Are you comfortable with it? Are you right?" And he said, "Yes."

That's as much as I recall about the incident.

Q Now, did there come a time when you received or saw an opinion letter or it was read to you?

A I read the opinion letter, but I read it subsequent to that closing.

Q At any time did you have the view that the opinion letter was without basis?

A No, sir.

Q And did Newburger, Loeb Company, Inc., rely upon the opinion letter prepared by Mr. Persky?

A Yes, sir.

Q Are you aware of a lawsuit, which subsequently was turned into an arbitration, involving Mr. Kayne and Mr. Sloane against Mr. Gross?

A Yes.

Q When for the first time was that discussed with you?

A Mr. Kayne had said in the fall of 1970 that he personally had some claims against Mr. Gross, and I was told -- you know, he mentioned it in conversation with me as well as others.

Q And did there come a time when you were advised that a lawsuit was being instituted involving those claims?

A Yes.

Q When were you so advised?

A I found out about it, that they were going forward with it, at about the time it was instituted, which was sometime in February or early February, before the closing.

Q And were you advised of the underlying facts dealing with the lawsuit?

A The comments by Mr. Kayne that stuck in my mind were that he had made -- he had become a partner of Newburger Loeb relying on capital numbers indicated in a partnership agreement and it was his feeling that those capital numbers were incorrect, not right.

Q At any time did you have the opinion that the lawsuit being instituted by Mr. Kayne and Mr. Sloane against Mr. Gross was without merit?

A No.

MR. SHAW: May I just have a few minutes, your Honor? I am just going over my check list.

(Pause)

THE COURT: Mr. Shaw, the witness would probably like to chat with you for a minute.

MR. SHAW: Thank you.

(Pause)

MR. SHAW: I would like to state that Mr. Risher has just told me that he may be inaccurate with respect to the fees that were paid and owing to Finley Kumble and he would like the opportunity to check his records and conceivably amend that figure.

THE COURT: All right.

MR. MANDEL: His records here?

MR. SHAW: Check his records and amend that figure.

MR. MANDEL: Tonight?

MR. SHAW: Yes.

Q Did there come a time when you purchased, for the sum of $10,000, shares of Newburger, Loeb Company, Inc.?

A Yes.

Q And when did you make that purchase?

A On the night of February 11th.

Q And will you tell the Court how these shares which you purchased were valued in the amount of $10,000?

A The shares had a par value of one cent, and I was to receive 200,000 shares. And I had initially planned to pay $2000 for those shares.

At some point in January or February I was informed by the New York Stock Exchange that there was a rule that required an allied member of the exchange to have at least $10,000 at risk.

I tried to persuade the stock exchange to change their mind about that and make an exception, but they would not, and, therefore, I paid $10,000 for my shares instead of $2000.

Q Are you aware of what the book value of those shares was when you purchased them?

A At the time I purchased the shares, the arrangements made by the partnership -- by the corporation with the partnership caused the corporation to take on its books an amount of about $800,000 in goodwill and the goodwill represented the excess of purchase price over book value of those assets purchased. In other words, the corporation was overpaying for what it was getting from the partnership.

So, as a result of that, the book value of all of the common stock was a minus $800,000. Since I owned approximately sixteen percent of the company, then the book value of my shares was a minus $100,000, approximately, minus $120,000 approximately.

Q Now, are you familiar with the fact that there was an agreement reached between the various consenting partners, that is, the partners who consented to the transfer agreement, whereby among themselves they agreed to reduce the capital deficit of partners in capital deficit by the figure of approximately 25 percent of the deficit?

A I'm not aware of that in the form of any sort of written agreement between them.

Q When was that first discussed?

A Discussions of deficits and how they were to be made up -- discussions of deficits began in August of 1970, and by me from November 17, 1970 on.

The makeup of deficits in the form of notes to the corporation began to be discussed in late December, 1970.

Q When was an agreement reached with respect to payment of the notes which would be given to the corporation from the partners who were in deficit capital positions?

A Those agreements were reached over several sessions. But they got locked pretty well in, not much was done thereafter to change them, in the latter part of December, 1970.

Q And were all partners who were in deficit capital positions treated the same?

A No.

Q What was the manner in which the partners were treated?

A It was a very complicated arrangement. Would you like for me to describe it?

Q As best as you can and as simply as you can.

A Okay.

In a similar way to the way that we settled claims and drawn in receivables, we struck the best deals we could as quickly as we could, given the pressures that we were working under. Namely, we got as much money as we could get our hands on and some of it we could not get, and the structures as follows:

Partners who were not to have a major management role in the corporation and who had deficits of less than $25,000 did not give any notes to the corporation representing a makeup of those deficits.

Partners who were to play major management roles in the corporation were required to make up all of their deficits, and I might add that the accounting numbers that we used for those deficits were those at the end of November, 1970, because when we arrived at this agreement in late December, 1970, those were the best numbers that we had available to work with. We didn't have any others.

Partners who were to leave the company and who had more than $25,000 in deficit were required to make up approximately 75 percent of that deficit in the form of a note to the corporation.

MR. MANDEL: As of November?

THE WITNESS: Deficits stated as at November.

A (Continuing) We attempted in negotiations later on to get the deficit partners to use the December deficits instead of the November deficits and we were unable to do so because they had locked in at the end of December and as a result of negotiations we could not achieve that.

Q As of February 10, 1971, had you received the Peat Marwick financial statement for the year ending December 31, 1970?

A No, sir.

Q Was Mr. Gross a party to the agreement whereby the deficits were reduced between the various partners.

MR. MANDEL: I object to the form of the question.

MR. SHAW: Isn't it conceded that Mr. Gross was not a part to this agreement?

MR. MANDEL: All right. I'll withdraw it. I object to your statement, Mr. Shaw, that this was an agreement between the various partners. It was not.

Q What writing or series of writings reflect the reduction of the deficit of the various partners, as you have testified to?

A I don't know of any writing that speaks in terms of reduction of deficit. The corporation got back notes from deficit partners and, as I have just explained, the size of the notes that the corporation got back related to those deficits, in the fashion that I discussed. And, as I have indicated in depositions, what happens to the remaining amount of those deficits is a matter between partners and does not involve me or the corporation.

Q Did the partners who consented to the transfer agreement exchange releases among themselves?

A I think so, yes.

Q Did Mr. Gross exchange a release with any of the partners?

A I don't think so.

Q Did you consider that when you were doing this you were bribing or giving special treatment to the partners who were in deficit capital positions in order to induce them to go along with the transfer agreement?

A No. As far as I was concerned, I was hammering out the best deal I possibly could. I was attempting to recover for the company as much money as we possibly could, and as far as I know, until we did that, nobody had ever recovered one cent of deficits from any partners for all of the months that the deficits had been there.

Q Subsequently, did you, in fact, recover actual money from the partners who were in deficit capital positions?

A Yes. We developed a method of securing the notes that the partners gave to us by certain tax refunds that we thought they would be entitled to.

Q What was the total amount of their deficit?

A Nine hundred some-odd thousand dollars. Excuse me. That's not correct.

Deficits at November were approximately a million two hundred thousand dollars total, and we recovered roughly 75 percent of that number.

Deficits at December 31, 1970, were a larger number, approximately a million and a half dollars. But our recovery, as I've testified, did not change.

Q Mr. Risher, I have one final point which I would like to explore with you. Subsequent to February 11, 1971, did Newburger, Loeb Company, Inc., make payment of various sums of money towards the obligations of the general partners of Newburger Loeb?

A Yes.

Q I would like to direct your attention to the leases which were in existence as of February 10, 1971. Do you have a schedule or has a schedule been prepared of those leases?

A There is a schedule, but I don't know whether it is in the courtroom or not.

MR. GLATZER: Yes, it is.

THE WITNESS: My copy is in the office.

Q Mr. Risher, I show you additional defendants on counterclaim Kayne Exhibit K for identification and ask you to look at that.

A Yes. This is not the exhibit that I was referring to, looking for.

Q Does that exhibit set forth and identify the various leases between Newburger, Loeb and Co. partnership and various landlords in effect as of February 10, 1971?

A Yes.

Q Does it set forth the location of the space?

A It does. But I need to modify my previous answer.

This is not dated. But I know that this does not set it forth as of February 10, 1971. This sets it forth as of about August, 1970.

Q August, 1970.

A Right.

Q Can you, with reference to this schedule, make a mark with red crayon on the leases which were in effect as of February 10, 1971?

MR. GRUTMAN: Your Honor, I find that the closing binder contains a list on a schedule, specific lease related liabilities.

MR. SHAW: I apologize for the disarray at the last point I am trying to make, your Honor. That is why it is the last point.

(Pause)

THE WITNESS: All right. Now I have it.

MR. SHAW: Could you mark this as an exhibit for identification.

(Plaintiff's Exhibit 123 was marked for identification.) xxx

Q I ask you the same question with respect to 123 for identification. Does this set forth the leases in effect as of February 10, 1971, between Newburger Loeb and various landlords?

A Yes, it does.

Q And were these leases assumed by the corporation? Withdrawn.

MR. SHAW: I offer this in evidence.

MR. MANDEL: No objection.

(Plaintiff's Exhibit 123 for identification was received in evidence.) xxx

Q And did the corporation pay rent on these various leases?

A Yes, it did.

Q During what period of time?

A The corporation continued to pay rent on these leases fully until February or March of 1974 and partially until November 11, 1974.

Q Which is the date of the filing of the Chapter 11 proceeding, correct?

A Yes.

Q What space was given up in March of 1974?

A Well, at that point we were no longer able to make full payments on all of the lease related obligations and began to have to make partial payments.

MR. SHAW: No further questions.

MR. GRUTMAN: I have two things to inform the Court. First, Mr. Berkowitz, your Honor, we have spoken to him in California and I'm authorized on his behalf to state on the record that he has likewise consented to waive a jury.

THE COURT: Very good.

MR. GRUTMAN: I should be less than five minutes.

MR. SHAW: The witness has indicated to me that there is one question I should have asked and I forgot. May I, please?

THE COURT: Yes.

MR. GRUTMAN: Sure.

BY MR. SHAW:

Q I said I was going to ask you about FFF. On February 5, 1971, you were present at a meeting and you made some statements with respect to Rafkind and Company, did you not?

A Yes, sir.

Q And are those statements reflected on FFF?

A That's my recollection, if I can see it.

Q Can you tell the Court what you said on February 5th with respect to Rafkind?

A Yes. As I recall it, Mr. Mandel had indicated in this meeting that Mr. Gross needed and wanted cash so he could trade. And at that point in time I thought Mr. Gross was going to work for Rafkind and Company and I made a comment, which is noted here, that Mr. Gross is trading with Rafkind.

And apparently Mr. Mandel or someone did not understand what I meant by that statement, because later on there is my comment that says, "The point. Charles Gross has employment opportunities without capital." And the meaning of that was that Mr. Gross was going to be trading for Rafkind and Company and he did not need the capital that Mr. Mandel was saying that he needed.

Q Did you say anything at this meeting to the effect that you were going to withhold Mr. Gross' capital so that he couldn't trade at Rafkind and so that he would be injured in any way?

A No, sir.

MR. SHAW: No further questions.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q Mr. Risher, you have examined Exhibit FFF before you took the witness stand, did you not?

A Yes, I have.

Q And have you noticed that Mr. Silverman, who took these notes, has written out in the margin as though they were part of a play the names of the various speakers and then he put the substance of what is said alongside their name before the next speaker out in the left-hand margin? Do you notice that?

A Yes.

Q I invite your attention on page 3 of Exhibit FFF, where Mr. Steefel says -- first Mandel says, "Right or wrong. Rather take a deal which postpones realization. He is better off if nature takes its course," et cetera. Then Mr. Steefel says, "More likely that other partners can get," I think it is, "judgment against Charles." And then it says, "Claims. One. Use of partnership funds without authorization for trading. Two. Buckley claim. Three. Investment of partnership funds and took on debt to go into basketball team. Four. Lease at time when the firm was in difficulties," et cetera.

Do you recollect, having been present at the meeting, who it was who enumerated those claims?

A No. I'm sorry, I don't recall.

Q Very well.

In the negotiations which went on concerning the so-called forgiveness of the indebtedness that certain deficit partners had, were those negotiations that were conducted between the general partners themselves?

A You mean to the exclusion of others?

Q Well, the decision. Was this a decision made between the general partners themselves?

A Yes.

Q Mr. Mandel has offered in evidence a document called Exhibit Y, which consists of a letter under date of

February 11, 1971.

Is your Honor familiar with that letter?

It is the letter addressed to Messrs. Steefel, Richenthal and Eisenberg, signed by Lawrence J. Berkowitz, which I think I can fairly state in summary states that the corporation shall not make any payment to Charles Gross without the prior approval of any two of those three lawyers who were designated as the lawyers representing the subordinated lenders.

Do you recollect that document, sir?

A Yes, I do.

Q And do you have any awareness or knowledge of the circumstances as to how that document came into being?

A Yes. The attorneys for the limited partners felt strongly about claims against Mr. Gross and they felt strongly about the demands that Mr. Gross was making here and they insisted that the corporation agree to give them this veto right.

Q About making payment, is that correct?

A Yes, absolutely. It was their idea.

Q And the document was part of the closing documents executed on February 11th.

A Yes, sir.

Q During the course of the discussions that went on between November and February 11th, did you hear those various claims asserted against Charles Gross which I just showed to you on Exhibit FFF?

A Yes.

Q And do you recollect who it was who expressed those claims?

MR. MANDEL: At various meetings? At one time? In general?

Q In general.

A In general, those claims were expressed by Arthur Richenthal, Ned Frank, Robert Steefel, Max Freund.

Q Except for Ned Frank, who had been a partner in the firm, Messrs. Steefel, Richenthal and Freund were all lawyers, correct?

A Yes.

Q Besides Mr. Frank being a lawyer in his own right. But the others were lawyers representing people in the firm?

A Yes.

Q And they were either general partner, subordinated lenders or limited partners, correct?

A Yes.

Q The authorization for the preparation of the summons and complaint against Gross in this lawsuit, was that by authority from the executive committee of Newburger Loeb?

A Yes.

MR. GRUTMAN: No further questions.

THE COURT: Mr. Silfen, will you be long? We'll take our break now, if you are going to be more than three or four minutes.

MR. SILFEN: I might be more than that.

THE COURT: All right.

(Recess)

CROSS EXAMINATION

BY MR. SILFEN:

Q Mr. Risher, I think you told us this morning that your first dealings with Mr. Kayne may have been in or about July of 1970. Is that an accurate statement?

A In relation to Newburger Loeb. I met Mr. Kayne earlier than that.

Q Okay. Had you known Mr. Kayne during the year 1969?

A I think I met Mr. Kayne in 1969.

Q Had you had any business dealings with him?

A I think I may have had a small brokerage account with him for a period of time in 1969.

Q You mean you were a customer and he was your registered representative?

A Yes.

Q Other than that type of relationship, that is, broker-customer, were you part of any organization in which Mr. Kayne was involved, such as a partnership, a corporation, a joint venture or any other form of association?

A No.

Q How about Mr. Sloane? Can you tell me when for the first time you became aware of Mr. Sloane?

A I met him, too, sometime in 1969.

Q And in what capacity?

A I was just introduced to Mr. Sloane.

Q And would your answer with respect to Mr. Sloane be the same as with respect to Mr. Kayne, that is, you were not a part of any organization with Mr. Sloane in 1969?

A Yes. That's correct.

Q Now, after Risher, Muh and Co., Inc., was engaged by the partnership, did you deal with other partners other than Mr. Kayne?

A Yes.

Q Give me the names of some of the other partners of the partnership that you may have dealt with in your day to day dealings with the partnership other than Mr. Kayne.

A I dealt with Robert Stern, Ned Frank, Julius Schnall; ultimately Richard Stern, Leon Stern, Robert Newburger.

Q And were your dealings with all of these partners in connection with the work which you were doing on behalf of Risher, Muh and Co., Inc., for the partnership?

A Yes.

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Q Was the retention of Risher, Muh and Co., Inc., exclusive to Newburger Loeb, let's say beginning with August of 1970?

A Newburger Loeb accounted for 95 percent of our activities.

Q What percentage of your time was devoted to Newburger, Loeb and Co.?

A Nearly all.

Q Were both you and Mr. Muh involved with the day to day activities of the partnership, let's say beginning in August of 1970?

A No, I wouldn't say that. We were really sort of working on special projects that I identified earlier.

Q Those were the projects in connection with keeping revenues down, trying to keep costs out of control, sale of the basketball team, the real estate problems, the clearing agreement, the pressure on capital and the problem of capital withdrawals; would that be a fair statement?

A It got too broad. In August our principal concern was the basketball team, clearing, cost control and the leases.

Q How about in September?

A It stayed pretty much through September.

Q How about October?

It broadened some, and to my recollection in October Mr. Kayne made the proposal that he had made to reorganize the company into a corporation. It was broadened by that much in October.

Q Let me ask you this: prior to your seeing what Mr. Shaw showed you, additional defendant Kayne's Exhibit H, had Mr. Kayne had any discussions with you of and concerning that proposal?

A Other than concerning this proposal?

Q In other words, did you know anything about the proposal before you saw it in black and white?

A In general I knew something about it, a little bit about it before I saw it.

Q Okay. Now, keeping that proposal in front of you, and showing you Plaintiff's Exhibit 122, which was marked in evidence this morning, did you, in preparing -- that is, when Mr. Muh and yourself prepared -- Exhibit 122, which is now in evidence, have before you or rely upon in any way, shape or form additional defendant Kayne's Exhibit H in evidence?

A No.

Q So would it be a fair statement to say that in your opinion there is a difference between those two exhibits?

A I think there is a substantial difference.

Q Okay. Could you tell us what the substantial difference is?

A Yes. Mr. Kayne's proposal, as I read it, indicates that the corporation will pay the partnership approximately $520,000 in order to make the acquisition.

This proposal essentially pays nothing in order to make the acquisition. There is no cash going from the corporation to the partnership in return for the assets.

Q When you prepared Plaintiff's Exhibit 122 in evidence, did you consult Mr. Kayne about your proposal and the proposal of Mr. Muh?

A No.

Q To your knowledge, did Mr. Kayne have any awareness of that proposal?

A No.

Q Is it not a fact that in your proposal both Mr. Kayne and Mr. Sloane are specifically excluded?

A Yes.

Q And is it a fair statement to say that under the little category that says "Other Investors," at the time of your making that proposal in December neither Mr. Kayne nor Mr. Sloane were contemplated to be investors in this corporation?

A I don't know that. I have no recollection.

Q Did you have any discussions with Mr. Muh at this time, that is, in December of 1970, about Mr. Kayne's involvement in either management or equity in this new corporation?

MR. MANDEL: What time are you talking about?

MR. SILFEN: December, at or about the time of the making of that proposal.

MR. MANDEL: Which is what date?

MR. SILFEN: I think Mr. Risher placed it somewhere between the 10th and the 17th of December.

A May I have the question back, please?

THE COURT: You may.

(Question read)

A My earlier testimony is that this was prepared between November 17th and December 10th, not December 10th and December 17th.

Q My mistake.

MR. ROTHMAN: By "this" you are referring to 122?

THE WITNESS: Yes.

A The answer to your question is, yes, I had discussions in December, 1970, with Mr. Muh about Mr. Kayne's involvement in the management of the corporation.

Q Was that discussion before or after the meeting at which time Mr. Bialkin spoke with the New York Stock Exchange?

A I think it was after.

Q And is it a fair statement to say that there was a difference of opinion between Mr. Muh and yourself regarding

Mr. Kayne's potential involvement?

A Yes. I did not want Mr. Kayne in.

Q And Mr. Muh did.

A Yes.

Q Is it a fair statement to say that but for the insistence of the New York Stock Exchange that Mr. Kayne became involved because of his prior managerial experience, you would have resisted Mr. Kayne's inclusion in the new corporation?

A I did resist, but not successfully.

Q Your testimony this morning regarding, or earlier this afternoon, regarding the stock exchange requirements for capital contribution, you told us about a $10,000 number and then you told us about a sixteen and a half or sixteen percent interest which you had in the voting stock, was Mr. Kayne's interest, that is, dollarwise and percentagewise, the same as yours?

A Yes. My sixteen percent interest was in the total stock, not just the voting stock. I have a larger percentage interest in the voting stock. His interests were identical to mind.

MR. MANDEL: Excuse me. I'm very sorry. Could you come back, because I can't see him and I can't hear him.

MR. SILFEN: Sure.

(Pause)

Q So that Mr. Shaw's questions to you regarding book value of the stock of Newburger Loeb at this time would apply equally to Mr. Kayne.

A That's correct.

Q And would apply the same to Mr. Sloane, except on a reduced basis.

A That's correct.

Q Is it a fair statement to say that to your knowledge neither Mr. Kayne nor Mr. Sloane solicited an involvement in the formation of this new corporation?

A That is not a fair statement.

Q What is a fair statement, as you know it, about the circumstances under which Mr. Kayne and Mr. Sloane finally became involved?

A I think after Mr. Kayne began to believe that we could successfully conclude the transaction, he became interested in receiving the position that was being given to him by the New York Stock Exchange.

Q You testified that you became aware that Mr. Kayne and Mr. Sloane had resigned from the Newburger Loeb partnership effective November, 1970.

A Yes.

Q Did you communicate with either Mr. Kayne or Mr.

Sloane at any time telephonically or on a face-to-face basis during the month of December, 1970?

A I don't think so.

Q How about for the month of January, 1971, the same question?

A Yes, I did.

Q Would you tell us, first with whom you communicated and whether it was telephonically or on a face-to-face basis?

A I may have talked with Mr. Sloane by telephone in January and I think that Mr. Kayne came to New York in January, and I saw him when he came here.

Q Do you recall the substance of any of your conversations or conversation?

A No.

Q Mr. Shaw asked you about your awareness of a lawsuit which Mr. Kayne and Mr. Sloane instituted in the State of California against Mr. Gross, with knowledge that you had an awareness. I think you also testified --

MR. MANDEL: Excuse me. Did the witness say something on the record? I think he just shook his head.

THE WITNESS: I nodded my head yes. I had an awareness.

MR. MANDEL: Yes.

Q I think you said at some time in the fall of 1970 you may have had a conversation with Mr. Kayne about some problem or grievance that he may have had against Mr. Gross.

A I don't know that I had a conversation with him. I heard Mr. Kayne say to others that he thought he had claims against Mr. Gross.

Q Do you recall hearing that or being in a room where that may have been said at any other time other than in the fall of 1970?

A I don't mean to imply that I only heard that once. I heard it more than once and the specific places and ways I heard it I don't recall.

Q How about the times that you heard it?

A No, I can't tell you.

Q Did Mr. Kayne ever tell you that he intended to commence a lawsuit against Mr. Gross for the purpose of persuading Mr. Gross, Miss Bleich and Miss Donoghue to change their minds about the transfer agreement?

A No.

Q Were you ever privy to any conversation where the subject of Mr. Kayne's California lawsuit came to bear other than what you have already testified to?

A That testimony concerned the fall of 1970. In 1971 I knew that Mr. Kayne had begun a lawsuit and Mr. Kayne was here for the closing in February, 1971, and I remember his saying, "We have begun a lawsuit with Mr. Gross," and I knew what the lawsuit was about.

Q Did Mr. Kayne tell you the purpose for which the lawsuit was begun?

A No. I assumed it was to recover money.

Q From Mr. Gross?

A Yes.

Q Did you ever see the complaint in that lawsuit, other than maybe in this courtroom or at any time after February 11, 1971?

A I have never read the complaint.

Q Were you present at any time in December of 1970 or January of 1971 in the presence of Mr. Persky where it was said that Mr. Kayne and Mr. Sloane had instituted a lawsuit against Mr. Gross in California as a wedge or a lever to convince Mr. Gross to convince Miss Bleich and Miss Donoghue to go along with the transfer agreement?

A No.

MR. SILFEN: No further questions.

CROSS EXAMINATION

BY MR. MOSS:

Q Mr. Risher, between December, 1970, to the closing on February 11, 1971, do you know who was Mr. Quarte's attorney?

A Yes. Mr. Arthur Richenthal.

Q Do you know David Abrams of Richenthal, Abrams and Moss?

A Yes, I do.

Q Do you know if Mr. Quarte attended a closing with Mr. David Abrams as his attorney?

A Yes, sir.

Q Do you know if Richenthal, Abrams and Moss represented any of the general partners in December of 1970 to the closing?

A No, they did not.

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Risher, you first discussed the question of becoming part of a group that would acquire Newburger Loeb when?

A Approximately September, 1970.

Q And that discussion you had with whom?

A Fred Kayne, and I think Ned Frank may have been involved in the discussion. And Bob Muh may have been involved in the discussion.

Q Do you recall that at the time of your first deposition, which was held on July 10, 1972 --

MR. GRUTMAN: And he was under oath.

Q And I ask you when you first recognized that there might be an opportunity for you to acquire an interest in

Newburger, Loeb and Company or some successor corporation or firm. You said late October or early November. Do you recall that?

A Yes.

Q Now, how do you square that with your present statement, which is also reflected in your answers to interrogatories?

A I square that by saying, Mr. Mandel, those dates are just not very strong in my mind and I just have an imprecise recollection of when it was. I've tried to say approximately or about, to indicate that I don't have a precise recollection.

Q Well, in 1972 you testified that the first time you recognized an opportunity Kayne spoke to you and Muh. Later on, after other people were deposed, you said in answers to interrogatories that it happened in September or October and that Ned Frank was involved.

Now, as you sit here today, which version is correct? The later version, right?

A In my mind, the version that is correct is the one I testified to here, which is that I know I spoke with Fred Kayne and that Mr. Frank may have been there and that Mr. Muh may have been there.

Q Your answers to interrogatories were verified on March 31, 1975, and in the answer to interrogatory one, which is, "On or about what date did you first discuss with anybody the possibility of your becoming a participant in a group, partnership, corporation or other entity which would acquire all or part of the assets or all or part of the business of Newburger Company?" that was interrogatory 1A, you answered, "September or October of 1970."

And then B, "Please name the person or persons with whom you had such discussions.

"B. Fred Kayne, Robert Muh, Ned Frank."

Now, has anything happened between March and today to change your recollection?

A No.

Q Now, would you tell me, please, with some detail and particularity, if you can, just what was the content of the discussion between Kayne, Muh, Frank and yourself in September or October of 1970?

A Mr. Kayne said he was going to reorganize Newburger Loeb, change its form of organization into a corporation. As a part of that process he wanted to bring new management into the company.

New management in Newburger Loeb was needed in any event. But given the problems that there are with partnership forms of organization, it would have been impossible to attract new management with Newburger Loeb organized as a partnership.

I don't recall now what percentage of the equity in the firm that I was to have, but that -- the amount of percentages of equity were discussed in the meeting.

Q Were you to be equal with Kayne?

A No.

Q Not in the first proposal.

A No.

Q Okay.

A And those are the important elements that I can think of that occurred in the discussion.

Q Didn't you and Kayne and Muh and Frank have some discussion about what you would have to do in order to make the climate favorable for a takeover of the business?

A I'm not sure how you mean that. If you mean it in the sense that I think you do, no.

Q Well, I'll use different language. Did you and Mr. Kayne and Mr. Frank and Mr. Muh have any discussion about how you would carry forward the plans to acquire the business or reorganize the business?

A Yes.

Q All right. Tell us something about those discussions, please.

A The discussion was that the business would be reorganized, Mr. Kayne was going to make a proposal to the partnership that encompassed that reorganization, and Mr. Kayne's proposal is here as an exhibit. I played no memorable role in the preparation of that proposal.

Q You say Kayne Exhibit H is something that emerged from your discussion in September or October?

MR. SILFEN: I don't think he said that at all, your Honor.

MR. MANDEL: This is cross examination.

A No, I did not testify and say that that emerged from our discussions. My testimony was that Mr. Kayne basically prepared this. I don't recall making any input into it.

Q And what was the date of Exhibit H?

A I don't quickly find the date.

Q I don't mean from the document. I mean from your memory or notes. Did you testify on direct about when Exhibit H emerged?

A My best recollection, and it is a guess, is that Exhibit H was given to the partnership, or was given to somebody in the partnership, I think perhaps it was given to Max Freund as counsel to Mr. Robert Newburger, about October of 1970.

Q What part were you to have if H went into effect?

A I'm sorry. I don't understand the question. You mean the percentage of equity or what role I would play?

Q Yes. What role would you play? What percentage of equity? What capital would you contribute?

A I said earlier I don't remember the percentage of equity that I would have. If you ask me to guess, I'll guess. Ten, twelve percent.

Q And what --

A My role would have been in corporate finance, and I don't recall ever any discussions of my personally contributing capital to it, but I'm sure it was expected that I would have had to play the best role I could in raising whatever capital was needed for the purchase and for the capitalization of the new organization.

Q Now, by this date you knew Robert Persky pretty well, didn't you? By October and November?

A Yes, sir.

Q You were working quite closely with him, weren't you?

A No, I wasn't closely involved with Mr. Persky in relation to Newburger Loeb in October and November of 1970, or at least as that applies to October and the first half of November.

Q Had you had a number of meetings with Mr. Persky before the date on which Exhibit H was disclosed to the partnership?

A I had known Mr. Persky since 1965 or '66, I think, and Mr. Persky had been the counsel for Risher Muh. I had a number of meetings with him in matters not pertaining to Newburger Loeb prior to August of 1970.

The things that I was working on in Newburger Loeb as it related to the Newburger Loeb project did not require my being involved very much with Mr. Persky.

Q In fact --

A At that period of time.

Q In fact, you introduced Persky and his law firm to the Newburger Loeb situation, right?

A That's correct.

Q And I now ask you specifically whether Persky and Finley Kumble were consulted or played any part in the preparation of H.

A I don't know.

Q Did you have any discussions with Mr. Persky about this proposed sale of assets embodied in Kayne Exhibit H?

A Not that I recall.

Q Where was the $750,000 going to come from?

A I'm not sure where you get $750,000.

Q All right. Maybe I'm wrong.

Look at the second page of Exhibit H. It says, "The corporation shall have a net capital in excess of $750,000."